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# STATUTORY PROCEEDINGS

## IN ILLINOIS

INCLUDING

ADMINISTRATION, APPEALS IN LAW, ELECTION CONTESTS,  
MECHANIC LIENS, PUBLIC REVENUE (LEVYING AND COL-  
LECTING), SPECIAL ASSESSMENTS (CITIES AND DRAIN-  
AGE DISTRICTS), COURT REVIEW OF VERDICTS,  
WORKMEN'S COMPENSATION, PUBLIC UTIL-  
ITIES, STATUTORY INNOVATIONS UPON  
THE COMMON LAW RULES, ETC.

CLASSIFIED TABLE OF CASES UNDER THE SUBJECT OF SPECIAL  
ASSESSMENTS; WITH FULL AND COMPLETE FORMS FOR THE  
USE OF MUNICIPALITIES, PROPERTY OWNERS AND  
CONTRACTORS, PREPARED BY THE LATE  
A. H. BAER, OF THE ST. CLAIR  
COUNTY BAR.

RULES OF PRACTICE AND PRESCRIBED FORMS FOR USE BEFORE  
THE WORKMEN'S COMPENSATION BOARD.

BY  
JARVIS DINSMOOR  
of the Sterling Bar

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CHICAGO  
BURDETTE J. SMITH & COMPANY  
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APR 23 1921

## PREFACE

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There are numerous books upon Law and Equity Practice in Illinois. What is here presented is designed to cover the field that lies between what is strictly law, and what is strictly chancery practice. There are treatises on the substantive law relating to the Administration of Estates—the devolution of property real and personal, Appeal in Law Cases, Mechanic Liens, collection of the Public Revenue, Local Assessments, Workmen's Compensation and other proceedings that owe their existence to the Legislature alone. What is lacking is a treatment of these subjects and others that come under the classification of "Statutory Proceedings," as they stand related to the limitations of the organic law, what is known as the "Record Proper" and the statute of 1837, which was the first blow by the Legislature at what Blackstone calls the "Bulwark of Gothic Liberty." A statutory provision for an assignment of error upon the verdict of a jury.

There are citators and digests of the decisions of the Supreme Court of Illinois, that give all future references to each particular case, regardless of whether reference is to a proposition of fact or a proposition of law.

The search for principles and propositions of law through a wilderness of "sayings," with the constant multiplication of cases, will soon be, if it is not already, a herculean task. Where the digests and citators stop, the work is here taken up of sifting, analyzing and arranging under some permanent lines the cases that relate to practice in "Statutory Proceedings." The efforts of the author in his own practice, to get at the law applicable

to the question to be discussed and presented in court and to preserve for future reference the results of research made in individual instances, very early led to the conception of marshalling authorities under four distinct heads, to wit: Direct attack—successful and unsuccessful; collateral attack—successful and unsuccessful.

Soon followed the conviction that the court practice in Illinois could not be treated logically and intelligible except in three volumes, and so gradually a volume upon statutory proceedings took shape and form, as well as two under the old grand divisions of Law and Equity.

Scattered through this work will be found a few references to the rules of law and chancery practice, without referring to the place where such rules can be found. This could not be done for two reasons: First. Except so far as the present work may be so considered, no attempt has yet been made and published to do for Puterbaugh what Stephens and Gould did for Chitty, to wit: Formulating and logically arranging the rigid rules of law pleading.

Second. It would mar the symmetry of the present work and break up its arrangement to attempt at different stages of its progression to interlard the rules of law and chancery, which should be found in the respective volumes upon each subject.

To illustrate: The rules in reference to closing up and settling the estate of a decedent belong properly in a chapter upon statutory proceedings. If however a controversy arises between the legal representative of a decedent and a creditor or claimant, that involves the question of the legal or equitable liability of the decedent, and the controversy in the process of determination reaches the circuit court and a verdict of the jury or the announcement of the chancellor is received by the parties interested, the practical question is presented: "How to preserve the fruits of the litigation?" The circuit court has been sitting in review of the action of

the probate court. Must the record be made up as one at law or one in chancery? The radical difference between a law record and a chancery record is stated by the author in the introductory chapter but all that has been done for the practitioner in the chapter treating upon this subject, and all that could be done consistent with the present scheme of arrangement is to put up a warning board, so to speak. State the facts and circumstances under which the particular question will arise, and refer to the rules of Law or Equity, as the case may be, to be followed in making up the record for review.

The subject of local assessments, since the adoption of the constitution of 1848, has been growing in importance and the machinery for adjusting the controversies, arising between land owners and municipalities in reference to the levy of special assessments, has become so intricate and complicated that an intimate acquaintance of all three of the grand divisions of practice in Illinois, is necessary in the assertion of the claims of the public and the defense of the rights of the individual.

It is nevertheless a statutory proceeding and a treatment of the court practice, that obtains in its use, is here taken up in general outline.

And to it is added the forms that were prepared by the late A. H. Baer, a member of the bar of St. Clair County, Illinois, for the use of municipalities in carrying through the work of spreading and collecting assessments, the forms that are needed by property owners in asserting their rights in court and those too, needed by material men and contractors in submitting bids for work with the forms of contract ordinarily required to be entered into, when local improvements are undertaken by public corporations.

No lawyer can feel sure of his footing, in court or perhaps, more especially in giving advice to clients, who does not know what the common law was or is, and so while the volumes referred to were taking shape there

grew a companion chapter on "Statutory Innovations upon the Rules of the Common Law."

As it is a kindred subject to the Statutory Innovations in court practice that have been wrought by the Legislature, it is here included.

JARVIS DINSMOOR.



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# Statutory Proceedings

## CHAPTER I

### FOREWORD

In 1837, the Tenth General Assembly of Illinois passed the following act:

AN ACT to amend the act entitled "An act concerning Practice in Courts of Law," approved January 29th, 1827.

Section 1. "That exceptions taken to opinions and decisions of the circuit court, upon the trial of causes, in which the parties agree that both matters of law and fact may be tried by the court; and in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed, and the party excepting may assign for error before the supreme court, any decision or opinion so excepted to, whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and evidence.

Section 2. "Exceptions taken to opinions or decisions of circuit courts, overruling motions in arrest of judgment, motions for new trials, and for continuances of causes, shall hereafter be allowed; and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding."

Approved July 21, 1837, Sess. Laws 109.

Sections 22 and 23, R. S. 1845, Chap. 83.

Sections 61 and 62, R. S. 1874, Chap. 110.

Sections 82, 83 and 84, Sess. Laws 1907, p. 460.

In all cases pending in any circuit court of this state, if both parties shall agree, both matters of law and fact may be tried by the court.

Sec. 9, Practice Act 1827, Revised Code of Law, p. 313.

Chap. 110, Sec. 41, R. S. 1874.

Chap. 110, Sec. 60, p. 2243, R. S. 1917.

See Statutory Review of Verdicts.

In 1818, a general statute had been passed declaring that the common law of England and certain statutes of the British parliament "shall be the rule of decision" in this state "until repealed by legislative authority." The constitution then in force, as does the present constitution, declared that the right of trial by jury should remain inviolate.

This statute of 1837 was the first radical departure, in our judicial history from the common law practice, for it furnished the machinery wherewith a defeated litigant might compel the supreme court to sit as a jury and re-weigh the facts, in civil cases.<sup>1</sup>

Later, other innovations followed: In 1846-7, an act was passed providing, that all instructions to juries should be in writing and confined to the law of the case; in 1849, provision was made for taking oral evidence before the court, in equity cases, under the same rules and regulations as evidence at common law; in 1857 an act was passed giving to a defendant in a criminal case a right to assign error upon the verdict, the same as had been given in 1837 in civil cases.<sup>2</sup>

July 1, 1877, an act was passed creating appellate courts as provided by article 6, section 11, of the constitution. Contemporaneous with that enactment, an amendment was added to the Practice Act, whereby the supreme court was restricted to its original common

1—Kerfoot v. Cromwell Mound Co., 115 Ill. 507.

2—Baxter v. the People, 3 Gil. 368; Pate v. the People, 3 Gil. 644;

Martin v. the People, 13 Ill. 341, Sess. Laws 1857, p. 103—p. 28. R. S. 1874, Sec. 63.

law function as a reviewing court in all cases except criminal cases, cases where a franchise, freehold or the validity of a statute was involved. Subsequently (1879) there was added the construction of the constitution and cases relating to revenue and cases where the state is interested.

In 1909 sections 121 and 122 of the Practice Act were amended, changing the method of reviewing judgments of the appellate court by appeal and writs of error, to writs of certiorari.

In 1911, an act was passed (re-enacted in 1913) providing, if employer and employee so elected, a commission appointed by the governor might determine the facts in all disputes between these parties in reference to claims for compensation for injuries "arising out of and in the course of employment."

In 1913, an act was passed providing for the appointment of a commission to determine all questions arising between individuals and public service corporations.

Contemporary with the enactment and subsequent use of these statutes, there has developed a power, not clearly defined, that through the medium of a bill in equity, assumes to control such governmental agencies as assessors, county collectors, commissioners of highways, city councils, city boards of improvement, and county courts, in rendering judgment against tax delinquent lands.

Prior to 1837, the law and equity practice as adopted from England had met the needs of judicial procedure. The chief difference between law and equity practice is: A judgment at law rests upon the verdict of a jury, upon whose finding of fact error cannot be assigned on review. A decree in equity rests upon a finding of fact by one man (chancellor) and is subject to review on appeal.

Actions or causes that owe their existence to an act of the legislature and are unknown to common law are called "statutory proceedings." The most important

heads under this classification are: Provisions made for conducting through the courts the administration of decedent's estates; enforcing the collection of public revenue; contesting elections and ultimate findings of fact by inferior tribunals not subject to review under the statute of 1837.

To proceedings that are not "law or equity" has now been added The Workmen's Compensation Act and the Public Utilities Commission. This ever-widening chasm between "law and equity" practice, brings the cases on practice into confusion and seeming conflict to one who has not clearly in mind the function of the "Record Proper," the "Statute of 1837," and the constitutional limitations upon legislative and judicial power. Consequently the habit has grown, among practitioners at the bar of "excepting" to every judgment, order, or decree of the courts of original jurisdiction, in order to save some fancied right, as though there were no rules and principles by which it could be determined in advance, when facts would be considered on review and when they would not.

In this new field of litigation created by legislation, an attempt is here made to point out the application of the rules of law and equity practice to statutory proceedings with a logical grouping of the authorities in their support.

In formulating rules of practice and at the same time determining the weight and value of judicial utterances, answers must be had to the following questions:

Was the case in which the opinion was pronounced a direct or collateral attack (on review every case is one or the other)?

Was it finally disposed of by an order affirming or reversing?

Was the litigant's appeal for action or non-action of the court successful or unsuccessful?

The arrangement here made, so far as possible, ex-



hibits in each instance answers to these questions. Thus are established lines or currents through which the law can be traced as can the title to a piece of real estate by an abstract.

With the realm of fact, under Magna Charta and the present organic law, sacred to the jury, the realm of law sacred to the court (judge) and both, under certain circumstances, subject to be controlled by a court of equity, the practicing lawyer at the beginning of his career, and through to the end, is met with the questions: What are propositions of law? What are propositions of fact? When has the litigant a constitutional right to have the facts reviewed by twelve men, and when has he the like right to have a review by one man? What did the court actually decide in the particular case under examination? When do the rules of law practice, and when do the rules of equity practice apply in statutory proceedings which partake of the nature of both and yet are neither one separately?

To be in a position to answer these questions the author has found it necessary, in his own practice, to make the examination and arrangement of the decisions of the Illinois Supreme Court, that is here submitted to an overburdened and indulgent profession.

#### MAXIMS TO BE OBSERVED IN THE EXAMINATION OF CASES

1. The positive authority of a decision is co-extensive only with the facts on which it is made. John Marshall, *Ogden v. Saunders*, 12 Wheaton 214-333.

2. It is a familiar rule of criticism in regard to judicial decisions, that the authority arises from what the court *decides*, in reference to the facts before it, rather than from what the judge, who delivers the opinion, may say in illustration and support of the ruling of the bench. Charles B. Lawrence, *Brown v. Coon*, 36 Ill. 243-246.

## CHAPTER II

### APPEAL—THE RULE AT COMMON LAW

A common law judgment could only be reviewed by a writ of error. A writ of error is a new suit.<sup>1</sup> It is a writ sued out of the upper court to review rulings upon propositions of law, made by the lower court to which the party, against whom the ruling was made, had entered upon the record at the time an exception. It is the individual ruling shown by the record to have been made by the lower court, to which an exception was noted at the time, that is passed upon by the upper court.

For example: In the court below, a judgment is rendered against X upon a promissory note. Certain evidence offered by X in support of his defense is excluded from the jury on the motion of the plaintiff. X at the time gives notice orally to the court and the opposite counsel, that he desires to except to the ruling. In contemplation of law, the exception is then and there written out, signed and sealed by the judge, but in actual practice it is not done until after the termination of the trial, or within such further time as may be agreed upon by the counsel of the respective parties, allowed by the presiding judge and made matter of record. This exception so preserved raises a question of law, which the court above passes upon under a writ of error.

At common law there was no review of questions of fact. The realm of fact under Magna Charta was sacred to the jury.

1—Ripley v. Morris, 2 Gil. 381. cago et al. v. Jenkins et al. 104  
Roberts et al. v. Fahs et al., 32 Ill. Ill. 143; Idem v. Idem, 107 Ill. 291.  
474; International Bank of Chi-

Modern statutory provisions for raising questions of law.

To aid in raising questions of law in actions in which there is a constitutional right to a trial by jury the Legislature in 1872 amended that clause (Sec. 9, p. 313) of the Practice Act of 1827, which provided that both matters of law and fact could be tried by the court, by enacting that "either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'refused' or 'held,' as he shall be of the opinion is the law, or modify the same, to which either party may except as to other opinions of the court." <sup>2</sup>

The reason for this enactment is: When the trial judge takes the place of the jury and makes a finding of fact and pronounces judgment thereon, though the evidence may fairly warrant his finding, he may have taken an erroneous view of the law, though the presumption on review is, that he did not. In the absence of any ruling upon the admissibility of proof offered upon the trial, there would otherwise be no means of presenting to the court of review any question of law for its decision.

The responsibility for a decision, under the common law practice, is thrown upon the jury if there has been no erroneous ruling by the judge. This is a tacit recognition of the sovereignty of the people, that is embodied in the jury to whom the judge in contemplation of law is ancillary.

This is one of the features that differentiates a chancery cause from one at law. In chancery the question

2—Practice Act 1827, Sec. 9, p. 313. Practice Act 1872, Sec. 41, p. 345. *Tibballs et al. v. Libby*, 97 Ill. 552 (Af.); *Hobbs v. Ferguson's Estate*, 100 Ill. 232 (Af.).

is: Is the final decree just and right as between the parties, regardless of special rulings upon single propositions of law or fact.<sup>3</sup>

But under modern practice common law judgments are reviewed upon appeal, as well as error. As a more expeditious way of reviewing judgments at law, the legislature<sup>4</sup> in 1827 provided for an appeal in all cases where the "judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of twenty dollars, or relate to a franchise or freehold." It has been held that this is a cumulative remedy and in no way restrictive of the original method of review by writ of error.<sup>5</sup> The verdicts of juries are now, under the statute of 1837, reviewed on appeal as well as on error.

#### APPEAL IN CHANCERY

In the absence of some statutory provision made therefor, an appeal is the only mode of reviewing a decree in chancery before a superior court. On appeal the same record that was submitted to the chancellor for hearing is taken to the upper court, and questions of law and fact are considered on review, as are questions of law upon a writ of error.<sup>6</sup>

3—Swift et al. v. Castle, 23 Ill. 209 (Af.); Hillyer v. Lewis et al., 81 Ill. 264 (Af.); Stone v. Wood, 85 Ill. 603 (Af.); Tunison v. Chamblin et al., 88 Ill. 378 (Af.); Willemín v. Dunn et al., 93 Ill. 511 (Af.); Ritter v. Schenk et al., 101 Ill. 387 (Af.); Smith et al. v. Long, 105 Ill. 485 (Af.); Treleaven v. Dixon, 119 Ill. 548 (Af.); Oswald, Appellee, vs. Nehls et al., 233 Ill. 438 (Af.).

4—Bowers v. Green, 1 Scam. 42 (R.); Morris et al. v. Chicago City

of, 11 Ill. 650 (R. R.); Skinner et al. v. Lake View Ave., 57 Ill. 151 (R. R.).

5—Sec. 32, Practice Act 1827, p. 318; Sec. 47, R. S., 1845, p. 420; Secs. 1-2-3, Ses. L. 1865, p. 3; Sec. 67, Ses. L. 1872, p. 348; Ses. L. 1877, p. 149 (Sec. 67, Ch. 110, R. S., 1874); Sec. 88, Ses. L. 1879, p. 222; Sec. 118, Practice Act, Ses. L. 1907, p. 467.

6—2 Daniell Chan. 1222, Enos et al. vs. Capps, 12 Ill. 255 (R.).

## MODERN PRACTICE

In 1829 an act was passed providing that the supreme court shall have final and conclusive jurisdiction of all matters of appeal, *error or* complaint from the judgment or *decrees* of any of the circuit courts of this state, and from such other inferior courts as may hereafter be established by law, in all matters of law and *equity*.<sup>7</sup>

Without any reference to this statute the supreme court, in *Greenup v. Porter*, 2 Scam. 417, overruled a motion made to quash a writ of error sued out to review a decree in chancery giving as a reason that it was the "uniform practice of the court from its first organization" to entertain such writs and that the English practice did not apply.

In *Wren v. Moss et al.*, 2 Gil. 72, a writ of error was sued out to review a decree of divorce. In sustaining a motion of the plaintiff for a rule on defendants to join in error, the court observes: "In *Carr v. Callaghan*, 3 Littell 377, the court intimated strongly, that they would so frame a writ of error in a chancery cause, as to bring all parties that might be affected by the reversal before them. For although it is a novel practice, introduced by statute, to bring writs of error on decrees in *chancery*, when an appeal would bring up the whole record, yet it is a practice long indulged. Such has been the practice here."

But in *McClay, Adm. et al. v. Norris*, 4 Gil. 370 (R. R.), where the question was as to the right of a minor to have a decree of foreclosure reviewed on error, the court observes:

"Our opinion of the right of any person, whether in-

7—R. S. 1833, p. 147; Chap. 29, Sec. 7, R. S. 1845. The words "error" and "equity" are omitted from Sec. 7, R. S. 1874, Ch. 37, p.

One partner can not confess a judgment in the name of his co-partner. *Sloo vs. State Bank of Ill.* 1 Scam. 428m.

fant or adult, to prosecute a writ of error in this court, is founded upon the fact, that it is a 'writ of right,' and lies in all cases, unless prohibited by some statute or inflexible rule of law; and also upon the statute of our state, passed July 1, 1829 entitled 'an Act Regulating the Supreme and Circuit Courts.' The court after quoting the second section of the act conclude: 'The statute is broad and comprehensive in its terms, and seems designed to embrace every case in which an erroneous decree or judgment may have been rendered in the circuit court.' "

In *Anderson v. Steger et al.*, 173 Ill. 112, which was a bill in equity for separate maintenance with the *Clark* case and the *Bowers* case *supra* before it, the court refers to the Statute of 1827 as the basis on which to rest the right to review decrees in equity by writ of error.

For a full discussion and elucidation of the law relating to writs of error, reference must be had to works on law practice alone; and if a like purpose is sought with regard to appeals, reference must be had to works upon chancery practice.

#### REVIEW ON ERROR AND APPEAL

In a purely statutory proceeding, if the judgment or decree does not pronounce upon the right of property or the right of personal liberty, and provision is made for an appeal no review can be had on error.<sup>8</sup> In de-

8—*Hobson v. Paine*, 40 Ill. 25; *Moore v. Mayfield*, 47 Ill. 167; *Holden et al. v. Herkimer*, 53 Ill. 258 Writ S. Dis.; *Horner v. Goe et al.*, 54 Ill. 285 (Writ Dis.); *Frans v. People, ex rel.* 59 Ill. 427 (Writ Dis.); *Ball v. Thode*, 75 Ill. 173 (Writ Dis.); *Ennis v. Id.*, 103 Ill. 95 (Writ Dis.); *Frank v. Moses et al.*, 118 Ill. 435 (Writ Dis.); *Kingsberry v. Sperry et al.*, 118 Ill. 279 (Writ Dis.); *Alberton et al. v. Hopkins*, 160 Ill. 448 (Af.); *Hart Bros. v. West Chicago Park Com.*, 186 Ill. 464 (Writ Dis.); *Sweeney vs. Chicago Telephone Co.*, 212 Ill. 475 (Writ Dis.); *Devous v. Gallatin Co.*, 244 Ill. 40 (Writ Dis.).

termining what proceedings are within this classification reference must be had to section 12, article 6 of the constitution which says: "The circuit court shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as may be provided by law." A review in an election contest under the statute, for judge of the Superior Court of Cook County, was attempted to be had in the circuit court.<sup>9</sup> In sustaining the action of the circuit court in dismissing the proceeding for want of jurisdiction, the court observes:

"The provisions of the constitution conferring original jurisdiction upon circuit courts includes the prosecution of every claim or demand in a court of justice which was known, at the adoption of the constitution, as an action at law or a suit in chancery. It also includes all actions, since provided for, in which personal or property rights are involved, which belong to the same class or are of the same nature as previously existing actions at law or in equity. Such are cases where the legislature creates a new statutory remedy for the recovery of property or damages occasioned by the infringement of a right. There are many special statutory proceedings which involve rights but are not within the terms of the constitution because they are not causes at law or equity. This proceeding has never been regarded, under the common law or equity practice, as a cause at law or equity, and is not of the same nature as such a cause."

A writ of error differs from an appeal, as a means of reviewing judgments and decrees in statutory proceedings, in this: A writ of error<sup>10</sup> can be sued out any time within three years from the rendition of the de-

<sup>9</sup>—*Douglas v. Hutchinson*, 183 Ill. 323 (Af.); *Brueggemann v. Young*, 208 Ill. 181 (R. R.).

Without a provision of statute therefor, no review of interlocutory

decrees. *Gage v. Eich et al.*, 53 Ill. 297 Ap. Dis.; *Gunn v. Donoghue*, 135 Ill. 479 Writ. Dis.

<sup>10</sup>—Sec. 117 Practice Act, Sec. Law 1907, p. 486.

cree or judgment complained of, and it brings up the whole record and not one particular decree or judgment from which an appeal has been prayed for and granted.<sup>11</sup>

#### DRAINAGE DISTRICT

An order was entered in the county court finding that a drainage district was properly organized.

It was attempted to have that order reviewed in the supreme court.

It was admitted that no appeal could be had prior to the Practice Act of 1907. The court says that there is none now because section 118 is to be construed as a continuation of section 88 of the prior act.<sup>12</sup>

In a statutory proceeding, where there are no property rights or personal liberty involved, in the absence of statutory provision therefor, no review can be had.

In *Ward v. The People*, 13 Ill. 635, the plaintiff in error was prosecuted and convicted of the violation of

11—*Drummer Creek Drainage Dist. et al. v. Roth et al.*, Plaintiffs in Error, 244 Ill. 68 (R. R.).

See *Littell et al. v. Board of Supervisors of Vermillion Co.*, 198 Ill. 205 (Af.).

Leading case on the subject of the right of one, who has signed a petition to be acted upon by a court or a political statutory organization, to withdraw his name before jurisdictional facts have been determined.

12—*Damon v. Barker*, 239 Ill. 637 (Ap. Dis.).

In *Myers v. Newcomb Drainage Dist.*, 245 Ill. 146. Neither the farm drainage act nor any other provision of the statutes of this state grants the right of appeal to or writ of error from the appellate court or supreme court in proceed-

ings for the organization of a drainage district under the Farm Drainage Act.

Special Assessment—Right of city to have a review. Though no right of appeal is given by Secs. 95 and 96, Local Improvements Act of 1897; a review may be had from an order of the county court sustaining objections, under Section 123, Act on Courts, Laws, p. 66, 1881. *Bloomington, City of, v. Reeves et al.*, 177 Ill. 161 (R. R.); *Chicago, City of, v. Singer et al.*, 202 Ill. 75 (R. R.); *Chicago, City of, v. Hulbert et al.*, 205 Ill. 346 (R. R.).

In a partition case it is held that an appeal, as does a writ of error, does not bring up the whole record, but only the order appealed from. *Ellguth, Appellant, vid et al.*, 250 Ill. 214.



an act prohibiting the retailing of intoxicating drinks, before a justice of the peace. He appealed to the circuit court and the appeal was dismissed. In sustaining the action of the lower court the supreme court thus observes :

“The principle is too well settled, by the repeated decisions of this and other courts, to require even a reference to authority to support it,—that, where a particular jurisdiction is conferred upon an inferior court or tribunal, its decision, when acting within the jurisdiction conferred, is final, unless provision is made by statute for an appeal from such decision. In no case has the circuit court inherent power to entertain appeals from inferior tribunals. Where but one trial is provided by law, that, of necessity, must be final.”

In *Coon v. Mason County*, 22 Ill. 666, the county court ordered a road to be opened and refused to allow the plaintiff any damages for land crossed by the road. The circuit court affirmed the order. The supreme court sustained a motion to dismiss because the statute provided that the decision of the circuit court should be final.

In *Moore v. Mayfield*, 47 Ill. 167, in a contest of an election, it was held that there could be no review on error because the statute provided that the decision of the circuit court, on appeal from a justice of the peace who had heard the contest in the first instance, should be final.

WHAT IS INCLUDED AND MEANT BY “ALL CAUSES IN LAW OR EQUITY”

Article 6, section 12, of the constitution: “The circuit court shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as may be provided by law.”

In an election contest for judge of the Superior Court

of Cook County a review was attempted to be had in the circuit court. The supreme court, in sustaining a dismissal by the court, thus observes, *Douglas v. Hutchinson*, 183 Ill. 323 (Af.), appeal from circuit court: "The provision of the constitution conferring original jurisdiction upon circuit courts includes the prosecution of every claim or demand in a court of justice which was known, at the adoption of the constitution, as an action at law or a suit in chancery. It also includes all actions, since provided for, in which personal or property rights are involved, which belong to the same class or are of the same nature as previously existing actions at law or in equity. Such are cases where the legislature creates a new statutory remedy for the recovery of property or for damages occasioned by the infringement of a right. There are many special statutory proceedings which involve rights but which are not within the terms of the constitution because they are not causes at law or equity. This proceeding has never been regarded, under the common law or equity practice, as a cause at law or in equity, and is not of the same nature as such a cause."

The same citation is made in *Brueggemann v. Young*, 208 Ill. 181, which was an election contest and cites the *Moore* case.

SECTIONS 122 OF THE COUNTY COURT ACT CHAP. 37 R. S. 1874  
APPEALS IN STATUTORY PROCEEDINGS

In view of the provision of section 8 of the Appellate Court Act (1877) for an appeal to the Appellate Court from the county court "in any suit or *proceeding at law or in chancery* other than criminal cases, etc." the question arose: To what extent does section 8, by implication, repeal section 122 of the County Court Act. It was held in *Sebree, Appellant v. Sebree et al.*, 293 Ill. 228 (Af.) following the *Myers* case, 245 Ill. 140, that an appeal from

a decree of the probate court "declaring heirship" was rightly taken to the circuit court.

The reason for this holding is, that the determination of a question of heirship is not had under and by virtue of the common law and equity powers of the court but purely by power conferred by statute.

#### PRACTICE ON APPEAL

But appeals for the removal of causes from an inferior to a superior court for the purpose of trial *de novo*, or for a review of the facts and law were unknown to the common law and can only be had where they are expressly given by statute.<sup>13</sup>

All the statutory provisions in reference to the time and manner of perfecting an appeal must be strictly conformed to. Provisions of statute limiting the time within which application for an appeal must be made are mandatory.<sup>14</sup> The Practice Act, section 121, provides that application for appeals shall be made within twenty (20) days.

A review of a judgment of an inferior court created by statute can only be had in the mode provided by statute; and the particular way provided for the appeal, excludes every other way.<sup>15</sup>

13—The Schooner "Constitution" v. Woodworth, 1 Scam. 511 (Aff.); Edwards et al. v. Vandemack, 13 Ill. 633 (Aff.); Ohio & Miss. Railroad Co. v. Lawrence, County of, 27 Ill. 50 (Aff.); Greve et al. v. Goodson et al., 142 Ill. 355 (Ap. Dis.); Harding v. Larkin et al., 41 Ill. 413 (R. B.); Anderson v. Steger et al., 173 Ill. 112 (Aff.); Marion County v. Harper, 44 Ill. 482 (Ap. Dis.).

14—Griffin v. Belleville (City of), 50 Ill. 422 (Aff.); Kemper v.

Waverly (Town of), 81 Ill. 278 (Aff.); Lewis v. Shear et al., 93 Ill. 121 (Ap. Dis.); Darwin et al. v. Jones, Admr., 82 Ill. 107 (Aff.); James v. Dexter et al., 112 Ill. 489 (Ap. Dis.); Bozier v. Williams, 92 Ill. 187 (R. B.); Vickers v. Tyn-dall, 168 Ill. 616 (Ap. Dis.); Wormley v. Idem, 96 Ill. 129 (Ap. Dis.); Sholty v. McIntyre, 136 Ill. 33 (Ap. Dis.).

15—Hill et al. v. Chicago (City of), 218 Ill. 178 (Ap. Dis.). A court cannot delegate to its clerk

The appeal must be perfected by the same number of persons to whom the right of appeal was granted and in conformity with the order of the court.<sup>16</sup>

An appeal can only be taken from a final judgment, which disposes of and settles finally the rights of the parties.<sup>17</sup>

There is no right of appeal in criminal cases.<sup>18</sup>

It must be a judicial act as distinguished from a ministerial act from which an appeal can be taken.<sup>19</sup>

Proper practice, when an appeal is taken from a justice of the peace, or the county court (probate side), to the circuit court, in addition to filing an appeal bond as determined by the justice or the court, is to advance the fees for a transcript of the record and the fees of the clerk of the circuit court. If the appellant neglects to do this, the appellee can file the transcript, pay the fees, and ask the circuit court for a rule on appellant to refund them. In the absence of a compliance with the rule or cause shown to the contrary, it is proper for the appeal to be dismissed.<sup>20</sup>

The filing and approval of the appeal bond suspends the action of the lower court and all steps of appellee

the power to approve an appeal bond in the absence of statutory provision for so doing; *Bowlesville Mining & Man. Co. v. Pulling*, 89 Ill. 58 (Aff.); *People ex rel. v. Gilbert*, 115 Ill. 59 (Aff.).

16—*Carson v. Merle et al.*, 3 Scam. 168 (R. R.); *Lingle et al. v. Chicago (City of)*, 210 Ill. 600 (Ap. Dis.); *Fortune v. Gilbert*, 207 Ill. 235 (Ap. Dis.); *Hileman v. Beale*, 115 Ill. 355 (Aff.); in the matter of *Story*, 120 Ill. 244 (R. R.); *Watson et al. v. Thrall*, 3 Gil. 69 (Ap. Dis.); *Johnson et al. v. Barber*, 4 Gil. 1 (Ap. Dis.); *Rorke v. Goldstein*, 86 Ill. 568 (Aff.); *C. P. & S. Railroad Co. v. President and Trus-*

*tees of Town of Marseilles*, 104 Ill. 61 (motion denied); *Tedrick v. Wells et al.*, 152 Ill. 214 (Aff.); *Propeller "Niagara" v. Markin*, 42 Ill. 106 (Ap. Dis.).

17—*Phelps v. Fickes et al.*, 63 Ill. 201 (Ap. Dis.); *Myers et al. v. Manny et al.*, 63 Ill. 211 (R. R.).

18—*French v. The People*, 77 Ill. 531 (Ap. Dis.); *Gallagher v. The People*, 207 Ill. 247 (motion denied).

19—*Aurora (City of) v. Schoeberlein*, 230 Ill. 496 (R.).

20—*Edwards v. Duling*, 36 Ill. 351 (R. R.); *Garrity v. Bush*, 84 Ill. 73 (Aff.); *Meserve, Exr., v. Delaney*, 112 Ill. 53 (Aff.).

to prosecute or defeat the cause of action must be had in the court above (circuit, appellate, or supreme).<sup>21</sup> The perfecting of an appeal is a continuation of the cause in the upper court, and the court below thereby loses all further control.

The appeal bond, when filed and approved, is in the nature of process, and all irregularities with reference to it, will be waived if the appellee appears in the upper court and makes no objection.<sup>22</sup>

#### REVIEW OF APPELLATE COURT JUDGMENTS

To partially relieve the supreme court from the duty imposed by the statute of 1837 of reviewing the verdicts of juries in common law causes, or findings of fact where, from the record, it appears that a jury trial has been waived by the parties, provision was made by the legis-

21—*Owens v. Kethe*, 5 Gil. 79; *Reynolds v. Perry*, 11 Ill. 534 (Ap. Dis.); *Boyd v. Cocher*, 31 Ill. 295 (Aff.); *Fix v. Quinn et al.*, 75 Ill. 232 (Aff.); *Miller v. The Superior Machine Co.*, 79 Ill. 450 (Aff.); *Pearce et al. v. Swan*, 1 Scam. 266 (Aff.).

22—*Easton v. Altum*, 1 Scam. 250 (Aff.); *Mitchell, Adm., v. Jacobs et al.*, 17 Ill. 235 (Aff.); *Kemper v. Waverly, Town of*, 81 Ill. 278 (Aff.); *Bozier v. Williams*, 92 Ill. 187 (R. R.).

In the *Bozier* case the statute provided that the appeal bond "shall be given within five (5) days from the time of entering the judgment." The appellee appeared in the circuit court and made a motion to dismiss the appeal because the bond had not been filed within the statutory time, which motion was overruled. The supreme court in holding this error thus observed:

"There is nothing in the record to show that appellant in any manner submitted himself to the jurisdiction of the court. He merely appeared in court and entered his motion to dismiss the appeal; and the right to do so at any time while the cause was on the docket could not have been affected by any rule of court. The appeal not having been taken within the time prescribed by law, the court acquired no jurisdiction of the case; and it could not lawfully, unless by consent of the appellee, have entered any order in it except to dismiss it."

\* In 1907 (Sess. Laws, Sec. 118, p. 467) was added: "Cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires."

lature in 1877, under section 11, article 6, of the constitution, for the organization of four appellate courts.<sup>23</sup>

This amounted to a repeal by implication of this statute as to all cases taken to the supreme court in which, under the constitution, a jury trial was guaranteed, except certain ones therein enumerated, viz.: Where a freehold, a franchise, the validity of a statute, the construction of the constitution, the public revenue, or the rights of the State were involved. In 1907 (Sess. Laws, sec. 118, p. 467) was added: "Cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires."

A further end sought by the legislature was, the creation of courts of last resort to litigants on propositions of law as well as fact in common law and equity cases, except the ones last enumerated, where the amount involved did not exceed exclusive of costs \$1,000; unless the judges themselves should be of the opinion that questions of law were involved of such importance that they should be passed upon by the supreme court.

#### SEC. 90 PRACTICE ACT

Section 90 of the Practice Act and 8 of the Appellate Court Act were enacted at the same time and contained the provisions for a review by the supreme court of the judgments of the appellate court.

The practice act provided for an appeal to the supreme court when the amount involved exceeded \$1,000 exclusive of costs. Section 8 of the Appellate Court Act provided that in actions *ex contractu*, where the amount involved was less than \$1,000 exclusive of costs and in

23—Moore v. Tierney, 100 Ill. 207 (Aff.); Kerfoot v. Cromwell Mound Co., 115 Ill. 502 (Aff.); Lewis v. Shear et al., 93 Ill. 121 (App. Dis.); Sess. Laws 1877, pages 68 and 153, Practice Act, 1877, Secs. 88, 89 and 91. Section 88 amended in 1879 Session Laws, p. 222.

actions sounding in damages where the judgment of the court below was less than \$1,000 exclusive of costs, the judgment or decree of the appellate court should be final and no appeal allowed thereon.

Neither section made special mention of causes of action, wherein no money or property rights were directly involved, such as bills for divorce, mandamus, injunction, certiorari, quo warranto, but grouped them under the words "all other cases."

And section 8 only allowed an appeal when the "order, judgment or decree is final," and section 90 allowed an appeal not only when it was final but also when the "judgment, order or decree of the appellate court be such that no further proceedings can be had in the court below, except to carry into effect the mandate of the appellate court."<sup>24</sup>

There is some conflict in the decisions as to the right of appeal under these two sections. The several members of the court have not been in strict accord, as to the construction and application of these two sections to the facts, in the variety of cases that have been presented. There is agreement, however, on the proposition that section 90 of the Practice Act, and section 8 of the Appellate Court Act "must be construed in *pari materia*, and given the same effect as if both were contained in the same act."

The cases wherein an appeal will lie from the appellate court to the supreme court can be grouped under the following heads:

1st. Where the judges certify that there are questions of law involved of such importance "on account of principal or collateral interest that they should be passed upon by the supreme court."

24—International Bank of Chicago et al. v. Jenkins et al., 104 Ill. 143 (R. R.).

Without a provision of statute

therefor, no review of interlocutory decrees. Gage v. Eich et al., 52 Ill. 297 (Aff. Dis.); Gunn v. Donoghue, 135 Ill. 479 (Writ Dis.).

2nd. Cases where the amount involved, being susceptible of direct proof exceeds \$1,000 exclusive of costs.

3rd. Where the amount sought to be recovered is not susceptible of direct proof and the judgment of the circuit court amounted to \$1,000 or more, exclusive of costs.

4th. "All other cases," that are not brought to recover money or property rights.

The leading case in which these two sections have been construed is *Baber, Exr. v. Pittsburg, Cincinnati & St. Louis Railroad Co., et al.*, 93 Ill. 342. This was an action upon the case for damages claimed to have been inflicted upon certain lots in the City of Chicago in consequence of the Pittsburg, Cincinnati & St. Louis Railroad Co., laying down its tracks in close proximity to the lots. The issue was found for the defendant. Judgment rendered against the plaintiff for costs, which on appeal was affirmed in the appellate court. In the supreme court the question was: Whether under section 8 of the Appellate Court Act, and section 90 of the Practice Act, that judgment could be reviewed. The supreme court speaking by Mr. Justice Mulkey held that section 8 of the Appellate Court Act and section 90 of the Practice Act, because enacted upon the same day "must be construed in *pari materia*, and given the same effect as if both were contained in the same act," that the above classification included all the cases wherein an appeal would lie from the appellate court to the supreme court, and that the court did have jurisdiction to review this judgment because: "Both the character and extent of the injury were clearly susceptible of direct proof by those who were familiar with the value of real property in that locality before and after the injury complained of. And as the damages charged in the declaration, and which the evidence on the part of the appellant tended to prove, were in excess of \$1,000, the appeal was, therefore, properly allowed, and the court has jurisdiction to review the action of the appellate court."



In an action for damages for failing to collect a draft for \$1,000, it was held that an appeal would not lie to the supreme court, because the damages were susceptible of direct proof and did not exceed \$1,000 exclusive of costs.<sup>25</sup> In an action by bill to set aside an award of \$704.62, which was sustained by the circuit court, the appellate court reversed the decree but did not remand the cause. On writ of error to the appellate court the supreme court refused to dismiss, holding that the amount involved exceeded \$1,000. As the matter stood between the parties, the complainant in the bill had charged against him an award of \$704.62, while he claimed indebtedness of \$400 against the defendant.<sup>26</sup>

In an action on the case for damages inflicted upon a rider of a bicycle by an act of the defendant's conductor, claimed to have been negligent, the judgment of the circuit court was \$1,000. A motion to dismiss the appeal in the supreme court was denied because the "damages sought to be recovered were speculative in character and not susceptible of direct proof and the damages are \$1,000 or more, as shown by the judgment."<sup>27</sup>

In a bill in equity, on reference to the master, \$1,000 was recommended to be charged against a guardian in favor of an attorney. It was held that the amount warranted an appeal to the supreme court.<sup>28</sup>

VALUE IN CONTROVERSY NOT EXCEEDING \$1,000 AND NO CERTIFICATE OF IMPORTANCE

A bill in chancery was filed to compel the removal of a dam which it was alleged caused the overflow of about three acres of land, of no great value. In the absence

25—*Bank of Commerce v. Miller*, 302 Ill. 410 (Ap. Dis.); *Cummins v. Holmes et al.*, 107 Ill. 552 (motion to dismiss denied).

26—*Moshier v. Shear*, 100 Ill. 469 (motion denied).

27—*North Chicago Street Railroad Co. v. Cossar*, 203 Ill. 608 R.

28—*Dougherty, Sr., et al. v. Hughes et al.*, 165 Ill. 384, App. Ct. R. Sup. Ct. Aff.

of a certificate of importance it was held that no appeal would lie to the supreme court.<sup>29</sup>

The appellate court reversed a decree of the circuit court that adjudged that \$60 per month should be paid to a wife and two children. It was held that an appeal would not lie to the supreme court as the amount in controversy did not exceed \$1,000.<sup>30</sup>

The appellate court affirmed the decree of the county court which denied the petition of an insolvent for an exemption of \$400. It was held that this decree did not come within any of the provisions of the statute allowing an appeal to the supreme court.<sup>31</sup>

But in a criminal case in which the defendant was fined \$15 for resisting an officer, it was held that a writ of error would lie from the supreme court to the appellate court because under section 11, article 6, of the constitution a writ of error is a writ of right of which a party cannot be deprived by legislation.<sup>32</sup>

#### ACTIONS SOUNDING IN DAMAGES

Judgment below less than \$1,000. But in actions for assault and battery,<sup>33</sup> personal injury from the wrongful conduct of another,<sup>34</sup> the wrongful levy upon property by a sheriff,<sup>35</sup> when judgment is rendered against the plaintiff for costs, it is held that no appeal lies to the supreme court, because they are actions sounding in damages and the judgment is for costs less than \$1,000.

29—*Talcott v. Schuh et al.*, 95 Ill. 201 (Ap. Dis.).

30—*Umlauf v. Umlauf*, 103 Ill. 651 (Ap. Dis.).

31—*In the matter of Landfield*, 182 Ill. 284 (Ap. Dis.).

32—*Smith v. The People*, 98 Ill. 407 (motion denied).

33—*McNay v. Stratton*, 109 Ill. 30.

34—*Smith v. Harris et al.*, 113 Ill. 136 (Ap. Dis.); *Baxtrom v. C. & N. W. Ry. Co.*, 117 Ill. 150 (Ap. Dis.); *Tucker v. Champaign Co., Agric.*, 154 Ill. 593 (Ap. Dis.).

35—*People v. Midkiff et al.*, 174 Ill. 323 (Ap. Dis.).

Actions such as injunctions, mandamus, divorce, certiorari, and quo warranto, that are embraced under the residuary clause of the statute "in all other cases," and do not involve money or property rights, are not under the limitation of \$1,000 referred to in section 90.<sup>36</sup>

#### AMENDMENT TO SECTION 8 IN 1887

In 1887 the legislature amended section 8 of the Appellate Court Act by adding: "And provided further, that in all actions where there was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the appellate court to the supreme court, where the amount claimed in the pleadings exceeds \$1,000."<sup>37</sup>

It was held under this amendment that remanding a cause, "for such other proceedings as to law and justice shall appertain," was not a final judgment, and that it was only in the case of final judgments that the court could resort to the pleadings to ascertain the amount involved.<sup>38</sup>

The fact that a verdict is returned in compliance with an instruction of the court does not warrant the defeated party on appeal, to maintain in the supreme court that there be no trial on the facts.<sup>39</sup>

In a case for personal injury, in which there had been a trial upon two of the counts in the declaration and a demurrer was sustained to three of the counts, and a verdict returned under direction for the defendant, it was sought in the supreme court to sustain the court's right to review the judgment on the ground that there

36—Hyslop et al. v. Finch, 99 Ill. 171; Peck et al. v. Herrington, 104 Ill. 83; French et al. v. Gibbs, 105 Ill. 523; Chalcraft v. L. E. & St. L. R. R. Co., 113 Ill. 86; Farmers' National Bank of Ill. v. Sperling, 113 Ill. 273; Richards v. People, ex rel., 100 Ill. 423; Green v. Goff, 153 Ill.

534; Tosetti Brewing Co. v. Koehler, 200 Ill. 369 (Aff.).

37—Session Laws 1887, pages 156-7.

38—Partridge, Exr., v. Stevens et al., 187 Ill. 383 (Ap. Dis.).

39—Cummings v. Chicago & N. W. Ry. Co., 189 Ill. 608 (Writ Dis.).

had been no trial on the issue of fact raised by the counts to which the demurrer had been sustained. In disposing of this contention of counsel for plaintiff in error the court observes: "This case having been disposed of by a trial in which an issue of fact was submitted to a jury, we cannot now say that it was finally disposed of upon the issue of law raised by the demurrer to the said counts in the declaration. It cannot be said that the counts demurred to were different matter, upon which the court passed as a question of law, from matters involved in the trial had before the jury." \* \* \* "Plaintiff's case being one sounding in damages when it was submitted to the jury on the issue of fact, the amount of the judgment was the criterion by which our jurisdiction was determined. The judgment being less than \$1,000, we could only obtain jurisdiction upon a certificate of importance from the appellate court." <sup>40</sup>

SOURCES FROM WHICH THE SUPREME COURT WILL ASCERTAIN  
THE AMOUNT INVOLVED

The amount involved, that governs the right to appeal from the appellate court to the supreme court must appear from the record itself, or from the certificate of the appellate court or judges. It cannot be shown by matter *dehors* the record. A decree of the circuit court establishing the liability of stockholders of an insolvent Bank to creditors of the Bank was affirmed in the appellate court. In dismissing an appeal for want of jurisdiction, supreme court observes: "We have examined the record with some care and have been unable to find (that the claim of either appellant is \$1,000 or more) any such finding or proof. \* \* \* The construction we have given to the statute requires that this *fact*

40—Robards v. Wabash R. R. Co.,  
194 Ill. 361 (Writ Dis.).

should appear from the record, or by certificate from the appellate court judges.”<sup>41</sup>

In an action of replevin the affidavit filed by the plaintiffs to procure the writ stated that the notes sued for were worth \$10,400. The circuit court found the issues for the defendant and rendered a judgment for costs against the plaintiff. The court in sustaining its right of review held that it sufficiently appeared from said affidavit that the amount involved exceeded \$1,000.<sup>42</sup>

But in an action of replevin in which the plaintiff to procure the writ “swore the property about to be replevied was worth \$1,000, and judgment was rendered for the plaintiff in both circuit and appellate courts the court held even (if it were admissible to resort to the affidavit)” to ascertain the amount involved it did not sufficiently appear to sustain the jurisdiction of the court.<sup>43</sup>

#### PRESUMPTION AS TO THE APPELLATE COURT’S FINDING OF FACT

There will be no presumption that the appellate court found the facts differently from the trial court unless the facts so differently found are recited in the final order, judgment, or decree. A certificate of facts made by the appellate court judges two months after the entering of the court’s judgment cannot be considered to disturb this presumption.<sup>44</sup>

Nor can the opinion of the appellate court be resorted to establish the proposition that the appellate court found the facts different from the circuit court.<sup>45</sup>

41—Piper et al. v. Jacobson, 98 Ill. 389 (Ap. Dis.); McGuirk v. Barry, 93 Ill. 118 (Ap. Dis.); Lewis v. Shear et al., 93 Ill. 121 (Ap. Dis.).

42—Morris admx., etc., v. Preston et al., 93 Ill. 215 (Judg. Aff.).

43—Hancock v. Tower, 93 Ill. 150 (Writ. Dis.).

44—Tibballs et al. v. Libby, 97 Ill. 552 (Judg. Aff.).

45—Coalfield Co. v. Peck, 98 Ill. 139 (R. R.); Harzfeld, et al., Co. v. Converse et al., 105 Ill. 534 (Aff.);

**EFFECT OF APPELLATE COURT JUDGMENT REVERSING AND  
REMANDING FOR FURTHER PROCEEDINGS**

No appeal lies to the supreme court where the judgment of the appellate court recites: "Reversed, and the cause remanded to the circuit court for such other and further proceedings as to law and justice shall appertain."<sup>46</sup>

But where the judgment, order, or decree of the appellate court is such that no further proceedings can be had in the court below, except to carry into effect the mandate of the appellate court, an appeal will lie to the supreme court.<sup>47</sup>

Amendment of 1887 provided for appeal to the supreme court from the appellate court, when there had been no trial in the circuit court upon an issue of fact.

It is held that this amendment does not apply to cases where a verdict has been returned under the direction of the court and the amount involved does not exceed \$1,000.<sup>48</sup>

The whole subject of the review of judgments of the appellate court by the supreme court is governed by

*Anderson v. Fruitt*, 108 Ill. 378 (Writ. Dis.).

46—*Chicago & North Western R. Y. Co. v. Andrews, Adm.*, 148 Ill. 27 W. Dis.; *Buck v. Hamilton, County of*, 99 Ill. 507 (Writ of error dis.); *Anderson v. Fruitt*, 108 Ill. 378 (Writ of error dis.); *International Bank et al. v. Jenkins Assignee, et al.*, 109 Ill. 219 (Writ of error dis.); *Chicago & N. W. R. R. v. Andrews, Admr.*, 148 Ill. 27 (Writ of error dis.); *Trustees of Schools v. Potter et al.*, 108 Ill. 433 (Writ of error dis.).

47—*Amberg v. Bartlett*, 190 Ill. 15 Ap. Dis.; *Joliet & Chicago R. R. Co. et al. v. Healy et al.*, 94 Ill. 416 (Decree rev.); *International Bank*

*of Chicago et al.*, 104 Ill. 143 (R. R.); *Englewood Connecting Ry. Co. v. Chicago & Eastern Ill. R. R. Co.*, 117 Ill. 611 (Aff.).

Note: No right of review when a decree is affirmed in part and reversed in part. *International Bank et al. v. Jenkins et al.*, 109 Ill. 219; *Gade et al. v. Forest Glen Brick and Tile Co. et al.*, 158 Ill. 39 Ap. Dis.

Session Laws 1887, pp. 156-7.

48—*Fisher v. The Nubian Iron Enamel Co.*, 163 Ill. 387 (Ap. dis.); *Cummings v. Chicago & N. W. Ry. Co.*, 189 Ill. 608 (Writ dis.); *Robards v. Wabash R. R. Co.*, 194 Ill. 361 (Writ. dis.); *Partridge, Ex-x, v. Stevens et al.*, 187, 383 (App. Dis.).

sections 121 and 122 as amended in 1909 session laws, p. 304.

In an action on the case for libel declaration claimed \$50,000 damages. Demurrers to the pleas that were interposed were overruled and the plaintiff elected to stand by the demurrer.

On writ of certiorari, the cause was removed into the supreme court. The court, after saying that section 8 of the Appellate Court Act has been repealed observes: "under the present statute a judgment in an action *ex contractu*, or in an action sounding in damages which does not exceed \$1,000, may only be brought from the appellate court to this court for review where the appellate court shall grant a certificate of importance. We have no power or authority to bring up for review, by certiorari, a judgment of the appellate court in an action *ex contractu* or sounding in damages which, exclusive of costs, does not exceed \$1,000; and this is true whether or not there has been a trial of any issue of fact in the lower court or not." <sup>49</sup>

In *Rizzo v. Catholic Order of Foresters*, 274 Ill. 91, Writ of Error dis.

A judgment of \$1,000, on appeal to the appellate court, was reversed and a judgment of *nil capiat* entered. The court granted a certificate of importance. By writ of error the record was removed into the supreme court. In dismissing the writ of error the court observes:

"But two methods are provided for the removal of cases from appellate courts to the supreme court for review by section 121. Regardless of the amount involved, appeals from judgments of the appellate courts are authorized upon certificates of importance granted by that court.

"In actions *ex contractu*, and in cases sounding in damages where the judgment exclusive of costs, shall be

<sup>49</sup>—*La Monte v. Kent*, 253 Ill. 230.

for more than \$1,000, the supreme court may cause the case to be certified to it for review by writ of certiorari. These two methods for the removal of cases from the appellate court to the supreme court for review are exclusive.

“The entire subject of removal of cases from the appellate court to the supreme court is now governed by the Practice Act, and the provisions of the Appellate Court Act, upon the subject of appeals which are inconsistent with section 121 of the said Practice Act, are repealed by said section. In this case the judgment being for an even \$1,000 exclusive of costs, under section 121 of the Practice Act, which repeals the provisions of the appellate court act authorizing a writ of error, could only be reviewed by the supreme court by appeal upon a certificate of importance granted.”

Court says no right to sue out a writ of error.<sup>50</sup>

#### STATUTORY PROCEEDINGS—RIGHT OF REVIEW ON ERROR

In a statutory proceeding, or in cases where authority is exercised by courts, a review on error may be had though there be no provision of statute therefore, if property rights or the right of personal liberty are involved, or else to deny the writ would result in a failure of justice.

In *Stuart v. People*, 3 Scam. 395 (R.), a fine of \$100 was adjudged against William Stuart for publishing an article in the *Chicago Daily American* that reflected upon the court and jury who were trying John Stone for murder. The point was made by counsel for the people that there was no provision for a review, and that consequently a writ of error would not lie. In holding that a writ of error would lie, the court speaking by Mr.

50—*Rizzo v. Catholic Order of Foresters*, 274 Ill. 91 Writ Dis.

Note: See *Hammond v. People*,

32 Ill. 446, for a discussion of right to sue out a writ of error in habeas corpus.



Justice Breese observes: "Perilous, indeed, would be the condition of the citizen if he had not the privilege, in such a case, to have it reviewed by another tribunal, and defective would be our jurisprudence if it afforded no means of relief."

In *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484, a writ of error was sued out to review a decree of the county court, under which real estate had been sold, it was held: "to prevent a failure of justice, that error would lie," as no appeal had been "allowed from the final order."

In *Schlattweiler v. St. Clair, County of*, 63 Ill. 449, it was sought to review a judgment of the circuit court awarding damages for the change and re-location of a highway. In sustaining a writ of error, the court observes: "The right to appeal or to sue out a writ of error is a constitutional right, and must be allowed when claimed."

Though no provision for a review had been made in case of a conviction under "Act concerning Bastardy," the right to a writ of error<sup>51</sup> was sustained on constitutional and common law grounds.

In a proceeding to condemn property for the purpose of laying out and widening a street, it was held that a party who claimed that his land had been damaged thereby, might have a review by writ of error,<sup>52</sup> obviously for the reason that property rights were involved.

In a proceeding by The People against an administrator for failure to make distribution of funds in accordance with an order of the Probate Court of Cook County, it was contended that a writ of error would not lie from an order of commitment to the county jail. In sustaining the right the court observes:

"We are aware of no statutory provision which

<sup>51</sup>—*Peak v. The People*, 76 Ill. 230 (R. R.).

<sup>52</sup>—*Hyde Park, Village of, v. Dunham*, 85 Ill. 569 (R. R.).

authorizes an appeal to the circuit court from the order of the probate court, committing the plaintiff in error for the alleged contempt, and it is clearly a final determination of that court in a criminal proceeding *directly affecting his liberty*, and unless a writ of error lies to the probate court in such case, he would be wholly remediless, however much error may have intervened. The right to a writ of error in a case like this is clearly deducible from the authorities already examined, and the case of *Stuart v. The People*, *supra*, is an authority directly in point upon the question.”<sup>53</sup>

#### DECREE ORGANIZING A DRAINAGE DISTRICT

In *Myers et al. Pl. in Error v. Newcomb Drainage Dis. et al.*, 245 Ill. 140, a writ of error was sued out to review a decree of the county court of Champaign county, which declared the Newcomb Special Drainage District, in response to a petition filed under section 76 of the Farm Drainage Act, to be duly organized. A motion was made in behalf of the Drainage District to dismiss the writ. It was sought to sustain the writ by reference to *Lynn v. Lynn Adm.*, 160 Ill. 307, wherein a decree of the county court ordering a sale of a decedent's land was reviewed on error. The Supreme Court in sustaining the motion says: That the decision in the *Lynn* case was based upon the fact that the administration act required the procedure for the sale of land to be carried on in conformity with the rules of chancery, and proceedings for the organization of Drainage Districts “are not instituted and carried on in substantial conformity with the forms and

53—*Haines v. The People*, 97 Ill. 161 (R.).

See discussion of the right to sue out a writ of error in a habeas corpus case, 32 Ill. 446 (R. R.); *Hammond v. The People*, 32 Ill. 446; *Cormack v. Marshall*, 211 Ill. 519

(writ denied); *Mahon et al. v. The People*, 218 Ill. 171 (R. R.).

Will contest. No guardian ad litem appointed for minors. A writ of error will lie to reverse the decree. *White et al. v. Kilmartin et al.*, 205 Ill. 525.

modes prescribed by the common law or by the rules of chancery, and are therefore not within the meaning of the statutes giving the right of appeal to and writ of error from the Appellate and Supreme Courts in any suit or proceeding at law or in chancery."

## CHAPTER III

### ANSWER IN CHANCERY

A Decree in Chancery entered without the personal appearance of the defendant is solely by virtue of the statute:

“Taking a bill *pro confesso* not known at common law. It was necessary that the party appear to give the court jurisdiction.”<sup>1</sup>

In *Garland v. Briton*, 12 Ill. 252, a decree was reversed because the summons that was served upon the defendant did not have upon it the seal of the court. The statute required all process to be under the seal of the court. The court says:

“The writ in this case did not purport to be under the seal of the court, nor the private seal of the clerk. It was, therefore, without vitality, and the service of the same was without effect.” This was a foreclosure decree.

1—*De Wolf et al. v. Long*, 2 Gil.  
679.

## CHAPTER IV

### ACTIO PERSONALIS MORITUR CUM PERSONA

#### INJURIES TO REAL PROPERTY

“With respect to injuries to real property, if either party die, no action in form *ex delicto* could be supported either by or against a personal representative before the statute.”<sup>1</sup>

“At common law, when an action had been commenced in the name of two or more persons, and one of them died pending the suit, it abated (then follows the statute);” and consequently, since that statute, if one of several plaintiffs die pending that suit, and the cause of action would survive to the survivor, he may proceed in the action. But if the cause of action do not survive, then the action would abate.”<sup>2</sup>

A difference has been held with respect to real actions where there are several plaintiffs, and there is summons and severance (as there is in most real actions), that in these the death of one of the parties abates the writ  
• • • if there be two joint tenants, and they bring a real action and one is summoned and severed, he shall proceed for his moiety, but if the person served dies, the writ abates because he goes for the whole and not as in the case of a joint tenant for a moiety.<sup>3</sup>

#### INJURIES TO THE PERSON

A judgment for an injury suffered by one, through negligence of a city in allowing a place in a side walk to

1—1 Chitty Pleading 69.

2—1 Chitty Pleading 67.

3—1 Bacon Abridgement 7.

remain open, after payment by the city, was sought to be collected from the administrator of the man who made the excavation in the street. The court, in holding that the action did not survive, observes:

“If the remedy over must be sought in an action founded in tort, and in form *ex delicto* for the recovery of damages, and the plea is not guilty, the action would not survive against the administrator, but would fall with the maxim, *Actio Personalis Moritur Cum Persona.*” 1 Chitty. Pl. 68.<sup>4</sup>

A. and B., on a partnership claim, sue C. Before judgment rendered against C., B. dies. C. did not plead the fact of the death of one of the partners in abatement. Under an execution issued upon the judgment, the land of the debtor was sold and subsequently a sheriff's deed was executed. It was held that, though the death of C. might have been pleaded in abatement in the original action, it could not be availed of in an ejectment proceeding, to recover the land sold by the sheriff.

It was held that the surviving partner would have had a right to prosecute the suit, after a suggestion of the co-plaintiff's death or an order *nunc pro tunc* might be entered after judgment.<sup>5</sup>

A guardian, who had been cited into court under section 8, Ch. 47, Stat. 1869, p. 315, died pending an appeal to the circuit court from a decree rendered against him. The executrix of the decedent, after having been served with process came into court and made a motion that the suit abate as to her. The circuit court sustained the motion and gave judgment against the wards for all costs. On review the only error found was: awarding all the costs against appellants, “each party to the record was liable for his own costs.”<sup>6</sup>

4—Knox, Adm., v. Sterling, City of, 73 Ill. 214 R. R.

5—Stoetzell et al. v. Fullerton, judgment debtor, 44 Ill. 108 R. R.

5—Life Ass. of America v. Fassett, 102 Ill. 315 (Af.).

6—Harvey et al. v. Harvey, Exrx., 87 Ill. 54.

February 12, 1853, the General Assembly passed the following act:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." 7

July 1, 1872, an act of the general assembly took effect which provided: "In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, and all actions of fraud or deceit." 8

These two acts of the general assembly are construed in *Holton v. Daly*, Admx., 106 Ill. 131, where it is held that the later act does not repeal by implication the former, which must be confined in its use to those cases in which the wrongful act is the cause of the death, but applies only to those cases in which death occurs from some other cause than the wrongful act. 9

7—*Laws of 1853*, p. 97; *R. S. (Hurd) 1874*, p. 582; *Laws 1903*; 1905, p. 111., p. 217. For the history of this enactment see *Chicago, City of, v. Major*, 18 Ill. 349; *Chicago and Rock Island Railroad Co. v. Morris et al.*, 26 Ill. 400; *Rhoads et al. v. Chicago and Alton Railroad Co.*, 227 Ill. 328; *Devine, Admr., v. Healy*, *Err. Def. in Error*, 241 Ill. 34 (R. R.).

8—*R. S. (Hurd) 1874*, p. 126, Ch. 3, Sec. 123.

9—*Holton v. Daly*, Admx., 106 Ill. 131 (R. R.); *Chicago & Eastern Ill. Railroad Co. v. O'Connor*, 119 Ill. 586 (Af.); *Prouty, Admr. Ap'ant, v. Chicago, City of*, 250 Ill. 222 R. R.

Further it is held that, in case of the death of the wrong-doer pending the action, his legal representative is liable, as was the decedent. The statute has changed the common law, under which, upon the death of the tort feisor the suit abates.<sup>10</sup>

10—Devine, Admr., Pfl. in Error,  
v. Healy, Exrx., 241 Ill. 34, R. R.



## CHAPTER V

### ADMINISTRATION

Upon the death of a party, at common law pending suits abated, and the ecclesiastical court, or some one appointed by that court assumed the control and the distribution of whatever personal property was owned by the decedent. In Illinois, the function of the ecclesiastical court, with certain statutory modifications, has been engrafted upon the probate court, or in some counties, upon what is known as the Probate Side of the County Court.

In *Knox County v. Davis*, 63 Ill. 405, the court, in speaking of the judicial supervision of the personal property, the title to which was in the decedent at the time of death, uses this language:

“The settlement of estates (quoting from page 420), although a large and highly important jurisdiction, is not, strictly speaking a common law jurisdiction. That kingdom, whence we draw our common law, has not, until it may be recently, committed the probate of wills, the granting of letters testamentary or of administration, and the settlement of estates, to any of the common law courts. Hence the jurisdiction of the settlement of estates by our county courts, is not a common law jurisdiction, but is strictly statutory.”

THE RIGHT TO TAKE PROPERTY BY DESCENT OR DEVICE IS  
• STATUTORY

In *Kochersperger v. Drake*, 167 Ill. 122 (R. R.), it is held that Chapter 39 of the Revised Statutes, entitled

**“An act in regard to the descent of property,” and chapter 148, entitled “An act in regard to wills,” in effect repeal the common law in reference to the descent or devise of property.<sup>1</sup>**

**APPOINTMENT OF A LEGAL REPRESENTATIVE FOR A DECEASED PERSON**

If a surviving husband or wife, who is not a non-resident within sixty days from date of death, files in the probate court (or county court, probate side), of the county within which was the domicile of the decedent, an affidavit stating the time of death, intestacy and the existence of personalty, it will awaken in the court power to issue letters of administration to the affiant, or some “competent person” nominated by the affiant.

It is usual to add the names of heirs and approximate amount of personalty. But these facts are not jurisdictional and their omission is not fatal.<sup>2</sup>

In the absence of a surviving spouse, children have a right to letters, or to nominate. In the absence of children, “the father,” “the mother,” “the brothers,” “the sisters,” “the grandchildren,” “the next of kin,” “the public administrator,” succeed in the order named to the original right of the surviving husband or wife.<sup>3</sup>

The duties of the person appointed are chiefly to inventory all property, real and personal, collect debts due the decedent, pay the legal claims against the decedent, that are presented in the manner provided by the statute, so far as there are assets sufficient for that purpose, and distribute any balance remaining, in accordance with the order of the court.

1—In re McWhirter, 235 Ill. 607 (Af.).

2—Judd v. Ross et al., 146 Ill. 40.

3—Ses. Laws 1905, p. 2; In re John McWhirter, 235 Ill. 607 (Af.).

Sec. 18, Chap. 3 R. S. “Administration,” giving husband a right to administer upon estate of deceased wife is mandatory. O’Rear v. Crum, 135 Ill. 294 (Af.).

To these simple duties, has been added by statute the duty of making application to the court for leave to sell real estate, when there is not sufficient personal property with which to pay the claims that have been proven and allowed, to raise funds for that purpose. This step brings the representative into collision with the heirs, or if there is a will, the devisees therein. Under the common law the heirs have as complete sovereignty over real estate, as does the legal representative over the personality. It is seldom that the legality of the appointment of an administrator is called in question, until by a proceeding in court an attempt is made to divest the heirs of title to real estate.

Administration, when the decedent leaves no personality within the State of Illinois but does die seised of real estate in the State of Illinois.

In 1833 in consequence of the legislature having made no "provision for the granting of administration in any case where the intestate, whether resident or non-resident, left no personal estate"<sup>4</sup> it was enacted as follows:

"In all cases where any person shall die seised or possessed of any real estate within this state, or having any right or interest therein, and shall have no relative or creditor within this state, or if there be any, who will not administer upon such deceased person's estate, it shall be the duty of the judge of probate, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county, and such public administrator may be made a party to any suit or proceeding in law or equity, and shall to all intents and purposes be liable as the personal representative of such deceased person."

It became necessary for the legislature to make this enactment because at common law, the dominion and title

<sup>4</sup>—R. S. 1833, p. 659; R. S. 1845, Sec. 58, p. 548; Sec. 46, R. S. 1874, p. 112.

to real estate passed to the heirs in the same way that the dominion and title to personalty passed to the ecclesiastical court. The action of a court depends upon its having within its grasp subject-matter and the parties; one or both. But the probate court in attempting to appoint an administrator of a deceased person, who left *no personalty*, would, without the aid of this statute, have neither one within its grasp.

#### DIRECT ATTACK UPON THE APPOINTMENT OF ADMINISTRATORS

There are few instances in which there have been direct attacks upon the appointments made by the county court to administer upon personal property.

In *Rosenthal, Public Admr. v. Prussing*, 108 Ill. 128, the public administrator of Cook County attacked a decree of the probate court appointing a creditor of a decedent, who died intestate, leaving no husband, and whose heirs and next of kin were residents of Germany. The court, after construing section 18 of Rev. Stat., 1874, "Administration of Estates" in connection with sections 46, 48 and 57 of the same chapter hold "that it was the intention of the statute to allow such preference," to wit: A creditor living in the state over the public administrator.

In *Krome v. Halbert*, 263 Ill. 172, a brother, who was a resident of Madison County, Illinois, attacked the decree of the Probate Court of St. Clair County, appointing the public administrator with will annexed upon the estate of his deceased sister who died testate in St. Louis, Missouri. The decedent died seised of real and possessed of personal property in said St. Clair County. The court, following the construction put upon section 18 of the chapter upon the "Administration of Estates" in *Rosenthal, Public Admr. v. Prussing*, 108 Ill. 128, sustain the attack and hold that "the general policy of giving the preference to near relatives to administer upon

estates" has not been changed by the amendment to section 18 by the legislature in 1905.

In *O'Rear v. Crum*, 135 Ill. 294, the appointment of a surviving husband was attacked because by a post-nuptial contract he had released all claim to his deceased wife's estate. The court in sustaining the appointment hold that the provision of the statute: "Administration shall be granted to the husband upon goods and chattels of his wife" is mandatory. That the post-nuptial contract had reference to the property of the wife and not to the statutory right to administer.

In *Judd v. Ross, et al.*, 146 Ill. 440, the appointment of an administrator was attacked because letters were issued forty-seven days after the death of the decedent and not to one "next of kin." The record showed that the widow had relinquished her right, but next of kin and creditors had not, and the application for appointment and the bond had been taken by the clerk within the time inhibited by the statute. The term of court but not the time when the court acted upon the petition was shown by the record, and it was held that, in the absence of proof to the contrary, the presumption would be indulged that "the order of court confirming the appointment was not made until authorized by the statute."

#### SUCCESSFUL DIRECT ATTACK UPON DECREE APPOINTING AN ADMINISTRATOR

The next day after the funeral of a bachelor, who died intestate, one of a number of nieces and nephews appeared in the county court, waived her right to administer and nominated her son. Her petition did not mention any of the other heirs. An hour later two petitions were filed by other heirs desiring the appointment of another person.

The circuit court sustained the first nomination. The supreme court in holding this error observes:

“Any one of the nephews and nieces residing in this state, and otherwise qualified, was entitled to be appointed as administrator, and the court might have granted letters to any one or more of them. Could he legally appoint a stranger to the class, nominated by one of these nephews or nieces, unless the others who were equally entitled to administer waived their rights? We think not. In our judgment the statute is mandatory to appoint one or more of the next of kin residing in the state, who were otherwise qualified, unless they waived their rights.”<sup>5</sup>

#### REAL ESTATE TO BE ADMINISTERED

In 1855, under section 58 R. S., 1845, which provided that when any person died seised of any real estate within this state and had no relative or creditor within the state the judge of probate, upon the application of any interested person, might commit the administration of such estate to the public administrator, the land of a non-resident was sold by the public administrator. On a writ of error, the decree ordering the sale was set aside. Here the record failed to show, that the application for the appointment of an administrator was made by a party interested in the estate; and it also failed to show, that there was no *relative* or *creditor* to whom administration might be committed. It was held that these facts must affirmatively appear, in order to give the court jurisdiction to appoint. On this point the court observes:

5—Justice v. Wilkins et al., 251 Ill. 13 (R. R.).

In re John McWhirter Estate, 235 Ill. 607 (Af.).

A non-resident widow cannot nominate an administrator for her deceased husband.

"The record purports to show all the facts on which the court assumes to act, and we cannot, therefore intend other and indispensable facts existed. Had the court found the fact to be, that there was no relative in the state, and that the party making the application for the appointment of an administrator, was interested in the estate, we should presume there was evidence of the facts, but not being found in the record, we cannot presume they exist." <sup>6</sup>

UNSUCCESSFUL COLLATERAL ATTACK UPON THE APPOINTMENT  
OF ADMINISTRATORS

In an ejectment suit an attack was made upon the decree appointing an administrator with will annexed of a non-resident.

The administrator applied for leave to sell real estate in Illinois. Such proceedings were had, as resulted in a sale and deed to the purchaser. In defeating the attack the court observes:

"From the whole tenor of the legislation of our state we are unable to perceive, that, whether the grant of such letters be a judicial or a ministerial act, it was never designed that, in a proper case for the grant of letters, any mistake, as to their character, should be held to render them, and all acts performed by the executor or administrator, void. Such a policy would be attended with great inconvenience, injury and loss to estates. It can hardly be supposed, that it was designed that, whether the act be judicial or ministerial, a mistake of the officer, as to whether to one person or to another, or as to the sufficiency of the security, should render all acts performed under them void." <sup>7</sup>

6—Unknown Heirs of Langworthy v. Baker, Adm., 23 Ill. 484. Schnell et al. v. Chicago, City of, 38 Ill. 382.

The rule laid down in Langworthy case criticised and restricted in. 7—Wight v. Wrlbaum et al., 39 Ill. 554 (Af.); Schnell et al. v.

An intestate died in Kentucky owning land in Illinois. An attack was made upon the decree appointing an administrator for the reason that he was neither a relative, creditor or interested in the estate. In sustaining the decree of appointment the court observes: "We must, in this proceeding, presume the court granting the letters, had satisfactory evidence before it to justify its action. There may have been facts before the court, calling it into action, which the law does not require should be preserved in the record, or in any other manner."<sup>8</sup>

Where sales have been made of the land of decedents or insane persons by administrators or conservators,<sup>9</sup> the decree of appointment will be sustained when attacked in chancery for mere irregularities. It will be enough, if it appears that a de facto officer was acting.

In an action on the case for causing death by an administrator appointed by the County Court of Bureau County, a release of damages signed by a former administrator appointed by the Probate Court of Cook County, was offered in evidence and denied admission. The lower court permitted it to be shown that the intestate was not a resident of Cook County, thereby to impeach the letters of appointment. After reviewing the authorities, the court conclude as follows: "While there are decisions to the contrary, the decided weight of authority is in favor of the proposition that the appointment of an administrator by a court of general probate jurisdiction is valid against collateral attack on the ground that the decedent was not a resident of the county."<sup>10</sup>

Chicago, City of, 38 Ill. 382, follows the Wight case but reverses on another point.

8—Hobson et al. v. Ewan, 62 Ill. 146 (Af.).

9—Duffin et al. v. Abbott et al.,

48 Ill. 17 (Af.); Dodge v. Cole et al., 97 Ill. 238 (Af.); Frothingham et al. v. Petty, 197 Ill. 418 (R. R.); Fecht v. Freeman, 251 Ill. 84 R. R.

10—Balsewicz v. C. B. & Q. R. R. Co., 240 Ill. 238 (R. R.).



## ADMINISTRATOR'S CLAIM FOR FEES

An executor's (administrator's) claim for fees is not barred by a final report omitting any charge for the same. The court fixes the same and can vacate the final order, and adjudicate upon amount.<sup>11</sup>

## ADMINISTRATION STATUTORY ORDERS

The action of the court upon each item in an executor's or administrator's report constitutes a separate decree from which an appeal may be prosecuted.

It is not a common law judgment, for that is entire and cannot be affirmed as to part and reversed as to part.<sup>12</sup> "The allowance or disallowance of the disconnected items in the report are to be held as independent orders of court."<sup>13</sup>

PERSONAL PROPERTY OF THE DECEDENT—EXCEPTION TO RULE  
REQUIRING ADMINISTRATION

The general rule is that all personal property goes in the first instance to an administrator. That in order to make any valid disposition of personalty, application must be first made to the probate court for the appointment of an administrator. To this rule there is an exception. If there are no debts due to or from the decedent and the personal property has come legitimately into the possession of the heirs, a bill in equity may be resorted to, without the preliminaries and form of administration, to effect a more perfect division and distribution.<sup>14</sup>

11—Griswold v. Smith, 221 Ill. 341 (Af.).

12—Curtis v. Brooks, 71 Ill. 125 (Af.); Morgan, Adm., v. Morgan, 83 Ill. 196 (Af.); Henning v. Eldridge, 146 Ill. 305 (Af.).

13—Millard v. Harris, 119 Ill. 185 (Af.).

14—Lewis v. Lyons et al., 13 Ill. 117 (Af.); Thornton et al. v. Mehring, 117 Ill. 55 (Af.); Moore et al., Pl'f in Error, v. Brandenburg et al., 248 Ill. 252 (R. R.).

See Session Laws 1905, p. 2, Sec.

18. Administration of estate may be dispensed with, if there are no

## COUNTY COURT (PROBATE SIDE)

## COLLECTION OF CLAIMS AGAINST DECEDENT'S ESTATES

Claims against a decedent's estate can be collected by a suit at law, and in some instances through the medium of a bill in equity, but the most common form of collection is through the statutory proceeding that gives the county court (probate side) sole jurisdiction. The statute does not require written pleadings. *Thorp v. Goewey, Adm'r*, 85 Ill. 611 (R. R.). The allowance of the claim is in the nature of a judgment but no execution can issue upon it.<sup>15</sup>

It is error to issue execution against the estate of a decedent.<sup>16</sup>

## COMMON LAW PRACTICE

Claims against decedent's estates, when they are such, as would be recovered by an action at law, if the decedent were living.

When claims are presented, that would be, if between two living persons, the subject matter of a suit at law, and are contested on appeal from the probate court, all questions of law and fact, if a review thereof is sought, must be preserved according to the practice at law.<sup>17</sup>

non-resident heirs, no minors and the estate is solvent.

15—Judgment but no execution can issue upon it. *Mitchell v. Mayo*, 16 Ill. 83; *Wheeler v. Dawson*, 63 Ill. 54, R. R.; *Grier, Exr., v. Cable*, 159 Ill. 29 (Af.); *Noe v. Moatray*, 170 Ill. 177 (Af.); *Thomson v. Black*, 200 Ill. 465 (Af.). "The common law remedies against a party cease at his death, and the statutory remedies against his estate provided by the administration

act must then be pursued, so far as the probate court is concerned."

16—*Welch, Adm'r, v. Wallace*, 3 Gil. 490, R. R.; *Peck v. Stevens et al.*, 5 Gil. 127, R. R.; *Judd v. Kelley*, 11 Ill. 211, R. R.; *Bull, Ad., etc., v. Harris*, 31 Ill. 487, R. R.; *Russell v. Hubbard*, 59 Ill. 335, R. R.; *Thorp v. Goewey, Adm.*, 85 Ill. 611, R. R.  
17—*Edgerton v. Weaver et al.*, 105 Ill. 43, Af.; *Hobbs v. Ferguson's Estate*, 100 Ill. 232, Af.; *McCall et al. v. Lee*, 120 Ill. 261, Af.;

## CHANCERY PRACTICE

In making up a record for review, when claims of an equitable character come to the circuit court by appeal from the probate court, the rules of chancery practice must be followed.<sup>18</sup>

## EXCEPTIONS TO STATUTORY PRESENTATION OF CLAIMS, TO THE COUNTY COURT IN THE FIRST INSTANCE—LAW

The circuit court having granted to it full original jurisdiction in Law and Equity is not deprived of its right to adjudicate, in the first instance upon its law side, upon claims against decedents, in consequence of the same power having been conferred by statute upon the county court (probate side). This question has been presented to the supreme court in those cases where the

*Belleville Savings Bank v. Borman et al.*, 124 Ill. 200, Af.; *National Bank et al. v. Le Moynes et al.*, 127 Ill. 253, Af.; *Waldron, Adm., et al., v. Alexander*, 136 Ill. 550, Af.; *Starrett v. Brosseau, Exr.*, 208 Ill. 408, Af.; *Schell v. Weaver*, 225 Ill. 159, Af.; *Zeigler, Appellant, v. Ill. Trust & Savings Bank, Ex'r*, 245 Ill. 180, Cir. Court Af.; App. Ct. reversed.

In *Grier, Ex'r, v. Cable*, 159 Ill. 29, Af. See *Douglas v. Hutchinson*, 183 Ill. 323. It is held that this is a statutory proceeding and that an appeal from the Probate Court will go to the Circuit and not the Appellate Court.

In *Christensen, Appellee, v. Bortelmann Co.*, 273-346, the *Grier* case is cited as an authority to support the proposition that an appeal lies to App. Court under 1911, p. 321, *Workmen's Compensation Act*.

18—*Doggett ex. v. Dill*, 108 Ill. 560, Af.; *Bliss v. Seaman*, 165 Ill. 422, Af.; *Estate of Ramsay v. Whitbeck*, 183 Ill. 550, R. R. Court: "All claims against estates of deceased persons are presented to the county court, and such claims are sometimes legal and sometimes equitable in character. These courts, therefore, hear and decide upon claims of both classes. If the claim be of an equitable character, it is of course governed by the principles of equity and the rules of equity procedure." *Henry v. Caruthers*, 196 Ill. 136, Af.; *Clemens v. Crane, Appellant*, 234 Ill. 215, Af.; *Trego, Trustee Plff. in Error, v. Cunningham Estate*, 267 Ill. 367, R. R.

Propositions of law only apply where there is a right to a jury trial. *Trego case, supra*.

creditor has begun suit directly in the circuit court, and in sustaining the action the court has said:

"A creditor of an estate is by no means compelled to present his claim to the probate court for allowance,—he can choose his forum and resort, in the first instance, to the circuit court, if that court has jurisdiction."

Further the court says: "though there is not perfect conformity between these sections, yet we think (sections 95 and 101 R. S. 1845) both can be made operative by confining section 95 to cases in the probate court, to which it is evidently directed, and section 101 to cases arising in the circuit court, by original suit."<sup>19</sup>

In the language of the court: *Bradwell v. Wilson*, 158 Ill. 326 (R. R.), "The sole question presented by the record is, has a justice of the peace jurisdiction of an action against an administrator upon an alleged cause of action against his intestate."

The court sustains the jurisdiction and says that the judgment before the justice having been rendered as one of the seventh class should on petition to the probate

19—*Rosenthal, Adm., v. Magee*, 41 Ill. 370, Af.

*Darling et al. v. McDonald*, 101 Ill. 370, Af. After letters of administration had issued, and within the statutory time, an action of assumpsit was begun for services rendered the decedent as a nurse. In sustaining the jurisdiction, the court says: "Jurisdiction is unaffected by the statute conferring jurisdiction upon the county court in the same class of cases. Judgment in the circuit court binds the assets in the hands of the administrator.

*Roberts v. Flatt et al.*, 142 Ill. 485, Af. Here in a petition to sell land to pay debts it appeared that there had been no deficiency decree

in a foreclosure proceeding. The court in following the case of *Darling v. McDonald*, 101 Ill. 370, says: "A judgment obtained in a court of competent jurisdiction, against an administrator, which was brought within two years from the grant of letters of administration, will be as binding as if the claim had been presented and allowed in the county court."

*Bradwell v. Wilson*, 158 Ill. 346, R. R. In the language of the court: "The sole question presented by the record is, has a justice of the peace jurisdiction of an action against an administrator upon an alleged cause of action against his intestate."

court have been allowed by that court as one of the same class.

The statute, although it confers jurisdiction on the probate court of claims against decedents estates does not thereby deprive the circuit court of its original jurisdiction of the same subject matter. *Darling et al. v. McDonald*, 101 Ill. 370 (Af.); *Bradwell, Admr. v. Wilson*, 158 Ill. 346 (R. R.). When a judgment in the circuit court is rendered against an administrator, it is proper practice to have the judgment classified and a certified copy of it filed in the probate court, to the end that it may be paid in due course of administration.

#### EQUITY

To establish a claim, against a decedent's estate, in a court of equity successfully, there must be an element of trust, or some other original head of equity jurisprudence, that, in its adjudication, requires the exercise of power outside the limited sphere of the probate court. Such as the enforcement of a claim against a deceased partner, that involves at the same time a consideration of the rights of the surviving partner; or where the decedent stands in some trust relation to certain property, out of which the claim arises.

The following case will illustrate the rule. A deceased partner, who owned land, died leaving his survivor, a partner, a brother, his only heir at law; there was no administration upon the decedent's estate; the surviving partner undertook to pay some of the creditors of the firm, by conveying some of the land by deed and by mortgage; thereafter other creditors filed a bill to collect their debts. Prior thereto, a creditor had obtained a judgment against the surviving partner. There was a levy and sale of the land by the sheriff. In sustaining a bill filed by a creditor the court observes:

"It is a fair inference from the whole case, that the

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deceased partner left no individual creditors, and no separate personal estate. The partnership creditors have therefore, an undoubted right to resort to the separate (real) estate for the payment of their debts. It is likewise a fair inference, from the record, that there has been no administration upon the estate. Under these circumstances, there can be no reasonable doubt of the authority of the court of equity to take jurisdiction of the case, at the instance of any of the joint creditors, and proceed to a full and final adjustment of the rights of all the creditors interested in the subject matter. The administration of assets, in the case of intestacy, is one of the acknowledged powers of a court of chancery.”<sup>20</sup>

20—*Vansyckle et al. v. Richardson et al.*, 13 Ill. 171, Af.

#### TRUSTS.

*Mason v. Tiffany*, Admx., 45 Ill. 392, R. R. Here a claim against a deceased partner was attempted to be collected through the medium of a bill, in chancery; the creditor's claim not being allowed in the probate court. Bill dismissed. Held error. The claim was of an equitable character; and the evidence showed that there was no prospect of making the claim out of the assets of the firm.

*Sutherland v. Harrison et al.*, 86 Ill. 363, Af. Here a piece of land had been sold to the decedent, and a contract given for a deed, but it did not mature till after the administrator had been discharged; there was no child or children; the widow had taken all the personalty; and the question being properly presented by bill in equity, it was held that the widow notwithstanding there had been no presentation of the claim to the probate court, and the administrator had been dis-

charged, must pay the amount of the contract debt for the land out of the personal estate received by her and thus increase the real estate fund going to the other heirs—collateral kin.

*Diversey, Adm., v. Johnson, Adm.*, 93 Ill. 547, Af. Here an administrator filed a bill against a surviving partner. The partner died, and a legal representative was substituted. Notwithstanding the administrator had been discharged, in and by the county court, a recovery was had against her, on a claim that had been established in the Probate Court.

*Clapp et al. v. Emery*, 98 Ill. 523, R. R. Here a bill in chancery was filed against administrators of one who in his life time acted in a fiduciary capacity. The point was made that there was no ground to sustain the bill, but the court say: The evidence shows a trust, that the decedent was authorized to collect and invest the complainant's money; and a court of equity is competent to take an account between trustee and cestui que trust.

UNSUCCESSFUL ATTEMPT TO ENFORCE CLAIMS AGAINST  
DECEDENT'S ESTATES THROUGH THE MEDIUM OF  
A BILL IN EQUITY

Unless some special reason is shown why the power and machinery of the probate court is not adequate for the adjudication, claims of an equitable character must first be presented to the probate court under the provision made by statute. The following cases represent unsuccessful attempts to maintain the jurisdiction of a court of equity.<sup>21</sup>

*Howell v. Moores*, 127 Ill. 67, R. in P. Here a bill in equity was filed against the administrator of a person who had acted as assignee, and sold and disposed of real estate and personal property. The court says that under the constitution the legislature could not deprive the circuit court of its jurisdiction, and sustain the bill. *Hays v. Bennett et al.*, 153 Ill. 271, Af.

*Elting v. First National Bank*, 173 Ill. 368, Af. Here a bill was filed by creditors of the decedent, who had proven their claims in the county court against an executrix for an accounting and settlement and for the purpose of setting aside an executor's sale of land under a decree of the county court, etc. The point was made that chancery had no jurisdiction. But it was held that the powers of the county court were inadequate, and that the interposition of equity was necessary. The decree of the county court allowing a claim was set aside.

*Mathewson v. Davis*, 191 Ill. 391, R. R. Here the point was made that a court of equity had no jurisdiction because there was a remedy at law and the claim was not proven against the estate in the probate

court. To this the court replies: "The jurisdiction of a court of equity was questioned by demurrer, but on demurrer being overruled, appellees answered without preserving the question in their answer. They submitted to the jurisdiction of the court, and it was only after the close of the testimony that they sought to raise it again by amendment. It was then too late."

21—*Armstrong et al. v. Cooper*, 11 Ill. 560, R. R.; *Wingate, Adm., etc., v. Pool*, 25 Ill. 118, R. & Bill Dis.; *Freeland, Ex'tor, etc., v. Dazey et al.*, 25 Ill. 294, R. R.

*Garvin, Bell & Co. v. Stewart's Heirs*, 59 Ill. 229, Af. Here an attempt was made to enforce, through a bill in chancery, a claim against the estate of a deceased partner. Bill dismissed. Held that the facts were different from the ones in the case: *Vansyckle v. Richardson*, 13 Ill. 171, where the real estate was held by bill, without any resort to the probate court.

*McBride v. Griffin*, 59 Ill. 231 (Af.). Bill dismissed because no averment that personality had been exhausted.

*Harris v. Douglas et al.*, 64 Ill. 466 (Af.).

## POWER LIMITED EQUITY ANCILLARY

After claims have been allowed in the probate court and the administration has proceeded or even concluded, it may appear that there are rights to be conserved, or claims defeated that require the exercise of power, that is outside of the limited sphere of administration, and this leads to filing bills in equity, as ancillary to the pending proceeding, or superior to it. This is well illustrated by the following case: A bill in chancery was

*Blanchard v. Williamson*, 70 Ill. 647 (R. R.). Without presenting a note against a decedent to the probate court, a bill in chancery was filed alleging that the note was lost, and hence not presented. Held, no excuse. "Law well settled, a court of equity will not assume jurisdiction, until the claimant shall have exhibited his claim and had it allowed in the county court; and if any special reason, that may be deemed sufficient can be assigned, why that court cannot afford the requisite relief, equity will assist him." *Heustis et al. v. Johnson*, 84 Ill. 61 (Af.); *Crain v. Kennedy*, 85 Ill. 340 (Af.).

*Hales v. Holland*, 92 Ill. 494 (R.).

*Scripp et al. v. King*, 103 Ill. 464 (Af.). Here the claim was that land had been fraudulently conveyed. Without going into the probate court, a creditor filed a bill. Held, the probate court must be first applied to.

*Harding v. Shephard*, 107 Ill. 264 (Af.).

*Barnard et al. v. Barnard*, 119 Ill. 92 (A. & R.). A person not presenting a claim, within a reasonable time to the probate court, is deemed, in the absence of satisfactory explanation, to have waived it.

*Winslow v. Leland et al.*, 128 Ill. 304 (Af.).

*Shepard v. Speer et al.*, 140 Ill. 238 (Af.). Here a bill was filed to take the settlement of an estate out of the hands of the probate court and place it in a court of equity. The bill was filed by the administrator seeking to have a court of equity determine what disposition should be made of the funds in his hands. In sustaining the lower court in dismissing the bill, it is observed:

"So far as shown by the present bill no extraordinary circumstances appear which would justify a court of equity to entertain jurisdiction to settle and close up the estate. Whether the facts as alleged in the bill are sufficient to make out a case, if they were properly presented to the probate court, is a question that does not properly arise on this record, and one upon which we express no opinion."

*Duval v. Duval et al.*, 153 Ill. 49 (Af.).

*Dougherty v. Hughes*, 165 Ill. 384 (R.).

*Goodman v. Kopperl et al.*, 169 Ill. 136 (Af.).

*Smith v. Smith et al.*, 174 Ill. 52 (Af.). In a partition proceeding it



filed by heirs against a widow and minor children asking that the administrator be decreed to pay them an amount equal to what decedent had advanced to the minor respectively—alleging that there was \$2,000 in the hands of the administrator undistributed. The bill was dismissed. Held error. In reversing the court observes:

“Courts of equity have a paramount jurisdiction in cases of administration and settlement of estates and may control courts in their action in the settlement of estates.”<sup>22</sup>

was sought to obtain an order to have paid out of the fund going to heirs the amount of a judgment allowance against the decedent in a court of California. Disallowed. Court saying: “Court of equity will not ordinarily assume jurisdiction of claims against an estate, until the claimant shall have exhibited his claim and had it allowed in the county court, and then if any special reasons, that may be deemed sufficient, can be assigned why that court cannot afford the requisite relief, equity will assist him, but not otherwise.”

*Patterson et al. v. Idem et al.*, 251 Ill. 153 (Af.).

*Ames et al. v. Ames et al.*, 148 Ill. 321 (R.), with directions to allow partition. Here infants, by next friend filed a bill for partition against adult heirs and the widow, asking for partition, assignment of dower and homestead.

A cross bill was filed asking that a receiver be appointed to manage and control certain property that the decedent left. The court below appointed a receiver to manage certain property that belonged in part to the minors. Held error under the facts shown in the record. This

would amount to taking the management of the wards' estate out of the hands of the probate court, which it was held could not be done. One reason being that the guardian of the minors had been appointed before the cross bill was filed to have a receiver appointed, and it would result in divesting the probate court of its res, which it was contrary to equity to attempt unless special circumstances were shown that necessitated it.

*Strauss et al. v. Phillips*, 189 Ill. 9 (Af.).

22—*Grattan v. Grattan*, 18 Ill. 167 (R. R.); *People v. Lott et al.*, 27 Ill. 215 (Af.).

*Townsend v. Radcliffe*, 44 Ill. 446, (R. R.). In the above case, surviving children of their mother filed a bill in chancery against the surviving husband, who had been administrator of his wife and whose accounts had been settled in the probate court, in which he charged himself with \$1,134.86 as husband of decedent. The probate court ordered him to pay it over to whomsoever entitled to it. The bill asked for an accounting and a payment to them. Bill dismissed. Held error. The Court observes: “That no tribunal

## CLAIMS OF AN EQUITABLE CHARACTER

County court on its probate side can exercise, in the investigation and allowance of claims, limited equitable power.

This right is well illustrated by the following case: Three persons executed a promissory note; after the death of one of them, the payee obtained a judgment against the survivors; had execution issue and a portion of the judgment was collected. If the estate of the maker, who was not joined in the suit, is to be held liable, at common law it could only be proceeded against in equity. A claim was presented for adjudication by the probate court against the decedent's estate; and the question was, whether the court had jurisdiction. The court held that it had jurisdiction and thus observes:

"The county court had jurisdiction to adjudicate upon the demand as an equitable money claim. The statute providing for the settlement of estates of deceased persons, empowers the county court to adjudicate upon all claims presented for allowance; and provides the mode and time of exhibiting them for allowance; and although the words claims, demands, and debts, are used in the statute in apparently the same connection, we are satisfied that mere equitable money demands are within their meaning, and therefore, within the jurisdiction of the court." 23

was more competent to settle the question to whom the money should go or be paid than a court of equity."

Lynch et al. v. Rotan et al., 39 Ill. 14 (R. R.).

Hartmann et al. v. Hartmann, 59 Ill. 103 (Af.).

McCreedy v. Mier et al., 64 Ill. 495; R. in Part. Bill sustained but reversed on interest charge.

Clark et al. v. Hogle et al., 52 Ill.

427 (R. R.). Here the Court says: "Complainant is entitled to call upon the administrator to show what he has done with the estate; what assets, if any, there be, subject to the payment of his debt."

23—Moore et al. v. Rogers, 19 Ill. 347 (Af.).

Dixon, Assignee v. Buell, Adm., 21 Ill. 203 (R.). Here the question was, whether the assignee of a lease could proceed in her own name be-

**ALLOWANCE OF CLAIMS BY FOREIGN TRIBUNALS—NO EXTRA  
TERRITORIAL EFFECT**

An attempt was made to enforce a judgment obtained in Ohio against an administrator appointed in Illinois, who had been within the jurisdiction of the Ohio court, so that the Ohio court had jurisdiction of his person. The court in disregarding make these observations: "It is not such a judgment as will bind the estate. The demand against the estate has not been adjusted in pursuance of our laws, but in defiance of them. If the creditor

fore the probate court. The Court held that whether, it was a legal or equitable assignment the assignee had a right to proceed in her own name: saying the probate court had equitable jurisdiction in the allowance of claims. *Gilbert v. Guptil*, 34 Ill. 112 (R. R.); *Hurd, Adm. v. Slater*, 43 Ill. 348 (Af.); *Heward v. Shagle et al.*, 52 Ill. 336 (R. R.); *P. v. Harrison, Adm.*, 82 Ill. 84 (R. R.); *Wadsworth v. Connell et al.*, 104 Ill. 369 (Af.).

*Brandon et al. v. Brown, Exr.*, 106 Ill. 51, 9 A. In this case (it was a case where the question was as to charging an executor or crediting him in his final report) the Court observes: "The county court, to the extent that it has jurisdiction, exercises equitable as well as legal powers."

*Doggett Exr. v. Dill*, 108 Ill. 560, (Af.). Here a partnership obligation was allowed against the estate of a deceased member. The Court in sustaining the jurisdiction say that there was no controversy between the individual creditors and the partnership creditors.

*McCall v. Lee*, 120 Ill. 261 (Af.). Here the Court says: that the probate court can act upon the equities

of the parties. But as a matter of fact, the Court treats the case as one at law purely, by refusing to review the facts.

*Millard v. Harris, Exr.*, 119 Ill. 185 (Af.).

*Wolf v. Beard*, 123 Ill. 588, In re *Corrington*, 124 Ill. 365.

*Schlink v. Maxton*, 153 Ill. 447 (Af.). A probate court may, at a subsequent term, set aside an allowance of a claim, but the facts alleged and proved to warrant it must be such as would move a court of equity to set aside the allowance.

*Mathews v. Kerfort*, 167 Ill. 313 (Af.).

*Sherman v. Whiteside*, 190 Ill. 576 (Af.). At a subsequent term an order allowing a claim, where fraud or mistake has intervened may be set aside, on motion.

*Heppe v. Szczepanski*, 209 Ill. 88 (Af.).

*Trego v. Estate of Cunningham*, 267 Ill. 367 (R. R.).

*Henry v. Caruthers*, 196 Ill. 136 (Af.). A partnership of which decedent was a member. In sustaining the allowance of the claim against the decedent's estate the Court says: "At common law a demand against a co-partnership was regarded as a

wishes to secure any share of the assets in this state, he must sue on his original cause of action." <sup>24</sup>

PRESENTATION OF CLAIMS—TIME WITHIN WHICH THEY MUST  
BE PRESENTED

A claim is not barred, if not presented within two years, but simply the right to claim a distributive share in, or any participation out of the property *actually inventoried*. Here an administrator sued upon a promissory note and the maker put in a set-off and it was held that the maker, if there was a balance due him from the

joint debt, and after the death of one of the co-partners the right of action at law was against the surviving partner or partners. Equity, however, afforded a remedy against the estate of the deceased partner in the event of the insolvency of the surviving partner or partners. The common law rule was subsequently modified, and the rule established in equity that all partnership debts should be deemed joint and several, and that the right of action existed at law against the surviving partners, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent or not."

24—Judy et al. v. Kelley, 11 Ill. 211 (R. R.).

Rosenthal, Admr., etc. v. Renick et al., 44 Ill. 202 (R. R.). Here a judgment of an Ohio court rendered upon a claim presented against the estate of a decedent was offered in evidence in a proceeding to sell real estate in Illinois; and the Court says:

"Q. A judgment against an administrator in one state is no evidence of indebtedness against an-

other administrator of the same decedent in another state, for the purpose of affecting assets received by the latter under his administration. The administrators are not regarded as in privity with each other."

Further the Court says: "As the claim was founded solely on a judgment rendered in Ohio, against an executor in that state, and to be paid there, in the language of the judgment, in due course of administration, it was improperly allowed by the County Court of Cook County."

McGarvey v. Darnall et al., 134 Ill. 367 (Af.).

Smith v. Goodrich, 167 Ill. 46, (R. R.). Here was a partition case and a person who had a judgment rendered in his favor against the estate of a decedent in California filed a cross bill and sought to have a portion of the fund set apart to pay the said judgment.

Here a transcript of the California judgment was put into an envelope and the clerk of the probate court endorsed a file mark upon it. Held: No presentation of a claim within the meaning of the statute.

decendent, might have judgment, although his claim had not been presented within the two years from the granting of letters of administration, for the balance "to be paid out of any estate thereafter discovered or inventoried." <sup>25</sup>

#### FORM OF JUDGMENT

The form of the judgment must be: "to be paid out of property to be discovered or inventoried after the lapse of two years from the granting of letters of administration." *Stone v. Clark*, 40 Ill. 411 (R. R.). Reversed for error in entering judgment.

The bar of the statute began to run from the date of the first letters of administration. (A will was found subsequently and the first letters revoked) and the allowance of any claim thereafter should be paid out of any estate to be discovered subsequent to said bar.<sup>26</sup>

#### CLAIMS AGAINST DECEDENTS—EQUITABLE LIMITATION

A creditor through administration must apply to the court for leave to subject the decedent's realty to sale within seven years from the death of the decedent by analogy to the lien of judgments and the limitation of entry upon, and action for the recovery of lands.<sup>27</sup>

25—*Peacock v. Havens*, Adm., 22 Ill. 23 (R. R.); 22 Ill. 24-9.

26—*Russell v. Hubbard et al.*, 59 Ill. 335 (R. R.).

The proper form of a judgment is given and affirmed in *Shepard v. Nat. Bank of Lawrence*, 67 Ill. 292 (Af.); *Darling et al. v. McDonald*, 101 Ill. 370 (Af.).

*Thorn v. Watson*, 5 Gil. 26, seems to be a leading case, but it was decided upon another point, which see *Saydacker v. Swan Land Co.*, 154 Ill. 220 (R. R.); *Morse v. Pacific Railroad Co.*, 191 Ill. 356 (Af.).

Form of judgment, when claim is present within two years. *Green v. Spiller*, 2 Scam. 502 (R. R.). Language of judgment stated in *Suppiger v. Cruzaz*, 137 Ill. 216.

In *People v. White*, 11 Ill. 349, it is said "The omission of administrator to give notice does not relieve the creditors from presenting their demands. Statute operates whether publication is made or not."

27—*Myer v. McDougal*, 47 Ill. 278 (R. R.); *Fitzgerald v. Glancy*, Adm., 49 Ill. 465 (R.); *Moore et al. v. Ellsworth et al.*, 51 Ill. 308

As the legislature has not fixed any definite period within which application must be made for the sale of decedent's land, courts of equity are not inclined to hold inflexibly to the rule of seven years if the delay can be satisfactorily explained. The decision of the court will depend very largely upon the facts and circumstances of each particular case. There must be action, however, within a reasonable time.<sup>28</sup> If no explanation for a delay longer than seven years is offered, the right to sell will be barred.<sup>29</sup>

COLLATERAL ATTACK IN EQUITY—JUDGMENT OF ALLOWANCE  
—WITHSTANDING COLLATERAL ATTACK

Facts: Bill filed by an heir to enjoin the collection of a claim allowed by the probate court against the estate of the heirs decedent.

The point was made that there was a release of the

(Af.); Bishop et al. v. O'Conner et al., 69 Ill. 431 (Af.).

28—Dorman et ux. v. Lane, Adm., 1 Gil. 143 (R. R.); McCoy v. Morrow, 18 Ill. 519 (Af.); Unknown Heirs of Langworthy v. Baker, Adm., 23 Ill. 484 (R.); Rosenthal, Adm. v. Renick et al., 44 Ill. 202 (R. R.); Clark et al. v. Hogle et al., 52 Ill. 427 (R. R.); Bursen et al. v. Goodspeed, Adm., 60 Ill. 277 (Af.); Wolf et al. v. Ogden, 66 Ill. 224 (R. R.); Guy, Adm., et al. v. Gericks, 85 Ill. 428 (R. R.); Reed v. Colby, Guardian, 89 Ill. 104 (Af.); Furlong v. Riley et al., 103 Ill. 628 (Af.); Barnard et al. v. Barnard, 119 Ill. 92 (R. and A.); Judd, Adm. v. Ross et al., 146 Ill. 40 (R. R.); Kipping et al. v. Demint et al., 184 Ill. 165 (Af.); Marshall, Adm. v. Coleman et al., 187 Ill. 556 (A. & R.).

29—Hurlbut v. Talbot et al., Appellees, 273 Ill. 299 (Af.).

In Noe v. Moutray, 170 Ill. 169 (Af.), it is said "the word *lien*, as used in these cases, has a qualified meaning and not the meaning, which is given to it in the first section of the chapter of the R. Stat. in regard to judgments."

In Graham v. Brock, 212 Ill. 571 (Af.), here nineteen years was held an unreasonable delay to sell land subject to dower. Not a sufficient excuse that property had recently advanced.

After an order for sale has been entered it cannot be executed after the lapse of twenty years. Green Lumber Co. v. Nutriment Co., 224 Ill. 234.

debt that had been executed in the life time of the decedent and the administrator failed to avail of it.

The court in holding that the bill would not lie says:

"It is not claimed that the administrator of Bailey had no knowledge of the release during the pendency of that suit, and there is no explanation of any kind offered for his laches. If parties have a defense available at law, as in this instance, they cannot invoke the aid of a court of chancery in order to secure its benefit. They have already had their day in court."

The judgment was duly obtained against the administrator, who was the legal representative of the deceased, and it is not alleged that he acted fraudulently or collusively. That judgment binds the personal estate in the absence of fraud."<sup>30</sup>

#### RIGHT OF ADMINISTRATOR OR EXECUTOR TO PERFORM DECEDENTS' CONTRACTS

All contracts made by the decedent may be performed by the executor or administrator when so directed by the county court. R. S. 1874, Chap. 3, section 127.<sup>31</sup>

30—Gold, Adm., et al. v. Bailey, 44 Ill. 491 (R. R.); Ward v. Durham et al., 134 Ill. 195 (Af.). Attack unsuccessful.

Sherman v. Whiteside, 190 Ill. 576 (Af.). Here the motion was made in the probate court to set aside the allowance, but not sustained.

31—Smith v. Wil. Coal Min. & Mfg. Co., 83 Ill. 498 (R. R.). "This statute does not change the common law rule except in one particular. Without this enabling statute the executor or administrator could not bind the estate nor relieve himself from personal responsibility."

In 1919 (Ses. Laws p. 4) the Gen-

eral Assembly enacted: *Section 1. Be it enacted by the People of the State of Illinois represented in the General Assembly: An Act entitled: "An Act in regard to the administration of estates," approved April 1, 1872, in force July 1, 1872, is amended by adding thereto a new section to be known as section 111a to read as follows:*

The amendment provides that the administrator may file a "petition in the court by which he was appointed" to have adjusted the equities between heirs and the vendee of the decedent upon a real estate contract.

See In re Estate of Mortenson,

## DISTRIBUTION OF THE ASSETS OF DECEDENTS

On Feb. 12, 1823, the legislature passed a statute providing for the distribution of estates of deceased persons.

On Jan. 28th, 1823, an act was passed authorizing administrators and executors, in case of deficiency of assets, to apply to the circuit court for leave to sell real estate to pay debts. These acts were superseded by the act—Wills and Testaments. Laws 1829, p. 190-237. Subsequently appearing in Revised Statutes 1874. See sections 70-71-72-73-74-112.

## COMMON LAW RULE

In *Paschall v. Hailman* (an appeal from an order of the Probate Justice of Randolph County, allowing an administrator a preference claimed by him over the creditors of the estate, lower court reversed), 4 Gil. 285, a judgment was obtained against the decedent May, 1826; judgment debtor died Dec. 1, 1830; judgment creditor appointed administrator. It was contended by the administrator (creditor) that he had a common law right to retain so much of the assets of the estate as would be sufficient to pay his judgment. The lower court so held. But the supreme court in reversing thus observes:

“When the decedent died, the Act of 1829 was in force, and that of 1823 repealed, and all the provisions of the Common Law of England, in relation to the right of an executor or administrator to retain in preference to other creditors in equal degree, *supplied, by prescribing* the manner in which he may prove his demand, against the estate; and by declaring, with certain exceptions before mentioned, that the assets shall be distributed,

248 Ill. 520, as to the validity of this statute. *Frackelton, Appellee v. Masters et al.*, 249 Ill. 30 (Af.);

*Moline, City of v. C. B. & Q. R. R. Co.*, 262 Ill. 52 (R. R.).



pro rata, among all the creditors who shall have filed and proved their claims within the time limited by law, without regard to the quality or dignity of the same.”<sup>32</sup>

#### DISTRIBUTION OF ASSETS OF DECEDENTS

“Prior to our (quoting from 193 Ill. 463) statute upon the subject, the dignity and priority of claims were governed by the common law, but when the legislature took hold of the subject it created a rule of its own, widely variant from the common law rule, and the latter no longer controlled. The power of the general assembly to thus regulate the passing and distribution of estates can hardly, at this age, be questioned.”

Here a claim of a domestic was presented to the probate court. And the question was, whether the claim should be classified as *third* or *seventh* under the statute. Held *third*.<sup>33</sup>

#### STATUTE OF DISTRIBUTION—NOTICE OF FINAL DISTRIBUTION JURISDICTIONAL

The court (probate) made an order in reference to the distribution of the surplus remaining in the hands of an administrator after selling land, without notice to the distributees. Action of the court held void. The court observing:

“Was this a bill in chancery for distribution, it will not be denied all the distributees would be made parties.

32—*Waterman v. Alden et al.*, 115 Ill. 83 (Af.). Construes section 93 of the statute in reference to the distribution of the property in kind, when there are no debts. *Colton, Exr. v. Leiter & Co.*, 131 Ill. 398 (Af.).

For distinction between “heirs at

law” and “heirs at law according to the Stat. of Descent in State of Ill.,” see *Walker v. Id.*, 283 Ill. 11 (R.).

33—*Chicago Title and Trust Co. v. McClew*, 193 Ill. 457 (Af.); *Reizer v. Mertz, Exr.*, 223 Ill. 555 (R. R.).

Wherein this proceeding differs from a bill in chancery, in principle, we cannot discover.”<sup>34</sup>

Where the court made an order that the amount of the distribution share of two heirs, who had not been heard from for twenty years, should be paid over to the heirs whose place of residence was known, the supreme court in holding the action of the lower court—no constructive notice having been given—void, thus observes:

“The fixing (quoting from 223 Ill. 563) by the court of the manner in which the notice of final settlement and application for discharge is to be given, where the notice is constructive, is *jurisdictional*, and no constructive notice can be given to a non-resident heir of final settlement and application for discharge which will be binding upon him, unless the court has fixed the manner of giving notice, by an order entered of record, prior to the time such notice is given.”<sup>35</sup>

SUCCESSFUL COLLATERAL ATTACK—WANT OF JURISDICTION  
APPEARING ON THE FACE OF RECORD

The Constitution of 1870, in defining the powers that may be conferred upon the county court, says that it shall have original jurisdiction of all probate matters, settlement of estates of deceased persons, appointment of guardians, the settlement of their accounts, etc. The power conferred upon the county court, thereby, is not co-extensive with the power exercised by a court of equity.

An action was brought upon the bond of a guardian against the surety. The decree of the probate court, finding the amount the guardian should be charged with, was offered to show a breach of the condition of the

34—Long, Adm. v. Thompson, Guardian et al., 60 Ill. 27 (Af.).

35—Reizer v. Mertz, Exr., 223 Ill. 555 (R. R.).

bond. On the face of the probate record, it appeared that the probate court had transcended its power or jurisdiction; it was therefore subject to successful collateral attack.

The court observes: "While said courts may, within the limit of the jurisdiction thus conferred, exercise chancery powers they are not given general chancery jurisdiction, even over the affairs of persons who may happen to hold the office of guardian. Doubtlessly they may, in settling guardian's accounts, charge a guardian with any sum of money which, as guardian, he is properly chargeable, and give him any credit to which, as guardian, he is entitled. But they cannot settle all equities between the guardian and his late ward." Pages 220-1.<sup>36</sup>

#### UNSUCCESSFUL ATTACK UPON DECREES IN COUNTY COURT (PROBATE SIDE)

Here a decree admitting a will to probate was attacked. Held not subject to successful attack because not void.<sup>37</sup>

#### COUNTY COURT EXERCISING CHANCERY POWER

The county court has no general chancery power, though when specially authorized by statute, legal and equitable power may be and is exercised. The county court on its probate side, though lacking full chancery power, can exercise in a limited decree those powers, and model its procedure after equitable forms.<sup>38</sup>

36—*The People v. Seelye*, 146 Ill. 189 (R. R.). See also *Chapman et al., Plaintiff in Error v. Am. Surety Co.*, 261 Ill. 594. Equity court superseded county court in settlement of guardian's account.

37—*Chicago Title & Trust Co. v.*

*Brown*, 183 Ill. 42 (R. R.); also *People v. Medart*, 166 Ill. 348 (Af.).

38—*Moore et al., Ad'rs v. Rogers*, 19 Ill. 347 (Af.); *Dixon v. Buell*, 21 Ill. 203 (R. R.); *Bond v. Lockwood*, 33 Ill. 212 (Decree in Sup. Ct.); *Gilbert v. Guptil*, 34 Ill. 112

## TESTED COLLATERALLY

In *Probst v. Meadows*, 13 Ill. 157, an executor filed a bill in equity attacking a decree of the county court (probate side) allowing a claim against the estate of Nicholas Probst. The order of allowance was entered eight months after the date of presentation—no order of continuance or notice to the executor was shown by the record. Without holding that the order is absolutely void, it is held in view of the lack of consideration for the note, which was the basis of the claim, there should be relief afforded in equity. In defining the jurisdiction of the court, these words are used:

“The county court, although limited, is not strictly speaking of inferior, and certainly is not of special jurisdiction. It is a court of record, and has a general jurisdiction of unlimited extent over a particular class of subjects; and when acting within that sphere, its jurisdiction is as general as that of the circuit court. When therefore, it is adjudicating upon the administration of estates over which it has a general jurisdiction, as liberal intendments will be granted in its favor, as would be extended to the circuit court; and it is not nec-

(R. R.); *Hurd v. Slaten*, 43 Ill. 348 (Af.); *In re Steele*, 65 Ill. 322 (R. R.); *Wadsworth v. Connell et al.*, 104 Ill. 369 (Af.); *Brandon et al. v. Brown, Exr.*, 106 Ill. 519 (Af.); *Spencer v. Boardman et al.*, 118 Ill. 553 (Af.); *Millard v. Harris, Ex.*, 119 Ill. 185 (Af.); *McCall et al. v. Lee*, 120 Ill. 261 (Af.); *Preston et al. v. Spaulding et al.*, 120 Ill. 208 (Af. Et. R.); *Wolf, Exr. v. Beaird et al., Exr.*, 123 Ill. 585 (R.); *In re Corrington*, 124 Ill. 363 (Af.); *Hanford Oil Co. et al. v. First National Bank*, 126 Ill. 584 (R. R.); *Ide v. Sayer et al.*, 129 Ill. 230 (Af.); *Schlink v. Maxton*, 153

Ill. 447 (Af.); *Dougherty, Sr. et al. v. Hughes et al.*, 165 Ill. 384 (Cir. Ct. Af.); *Sherman et al. v. Whiteside et al.*, 190 Ill. 576 (Af.); *Title Trust Co. et al. v. McGlew*, 193 Ill. 457 (Af.).

*Heppe v. Szczepanski*, 209 Ill. 88 (Af.). At a subsequent term on motion, the Court can set aside a decree allowing a claim but the facts alleged must be such as would move a court of equity to act.

Under the statute, when claims are adjudicated there are no written pleadings. *Thorp v. Goewey, Admr.*, 85 Ill. 611 (R. R.).

essary that all the facts and circumstances, which justify its action, should affirmatively appear upon the face of its proceedings." Quoted from page 169.<sup>39</sup>

#### JUDGMENT AGAINST ADMINISTRATION, WHEN BINDING UPON HEIRS AND WHEN NOT

When an administrator applies to the court for leave to sell real estate to pay debts, the judgment against the administrator is only conclusive, so far as personal property extends, but as to the real estate it is only *prima facie* evidence of the existence of the debt against the decedent. The heirs have a right to show, if they can, that the debt was not legally due, or that there was fraud in its allowance against the administrator.<sup>40</sup>

39—*Probst v. Meadows*, 13 Ill. 157.

Also under *Mitchell v. Mayo*, 16 Ill. 84 (R. R.). The decree allowing a claim draws interest at the statutory rate.

*Haana v. Sloecum*, 17 Ill. 387 (Af.). See several successive statutes creating the probate court referred to in the opinion.

*Mason et al. v. Blair*, 33 Ill. 194 (R. R.). Allowance of claim has force and effect of judgment.

*People v. Lott*, 36 Ill. 447 (R. R.); *Reynolds v. People*, 55 Ill. 332 (Af.); *Haywood v. Collins*, 60 Ill. 335 (R. R.); *Housh v. People*, 66 Ill. 181; *Moffitt v. Moffitt*, 69 Ill. 644 (Af.); *Barnet v. Wolf*, 70 Ill. 76 (Af.); *Frank v. The People*, 147 Ill. 112 (Af.); *People v. Medart*, 166 Ill. 351 (Af.); *Cassell v. Joseph*, 184 Ill. 383 (Af.).

See *Mortensen, In re.*, 248 Ill. 520, holding that the Act of 1909, p. 175, conferring jurisdiction of trusts on county court is void.

See *Barbero v. Thurman, Adm.*, S. P.—5

49 Ill. 285, where the real point decided in the *Probst* case is stated. See *Boyd v. Kimmel*, 244 Ill. 545, that cites the *Probst* case and declares the county court to be limited in its jurisdiction.

See *Chapman et al., Plaintiff in Error v. Am. Surety Co.*, 261 Ill. 594, holding that a court of equity can, when the settlement of a guardian's account involves matters outside the limited jurisdiction of the probate court, take jurisdiction and do complete equity.

In *Botswick v. Skinner*, 80 Ill. 152, it is said: "If the construction in the *Probst* case was wrong, it has too long been adhered to be now questioned."

See rule stated that will prevail when a foreign judgment is assailed collaterally. *Dunbar v. Hallowell*, 34 Ill. 168 (Af.).

40—*Dorman v. Yost et al.*, 13 Ill. 127 (R.); *Stone v. Wood*, 16 Ill. 177 (R. R.).

*Smith et al. v. McConnell et al.*, 17 Ill. 135 (Af.). The real point

## PETITION ON ADMINISTRATION TO SELL LAND

Though the chancery practice is partially followed in an application to the county court for an order to

in this case is that the administrator cannot maintain a bill to clear the title from clouds.

Hopkins et al. v. McCann, 19 Ill. 113 (R.). Principle upon which the cases rest re-examined and affirmed.

McConnell et al. v. Smith et al., 23 Ill. 611 (D. M.); Mason et al. v. Blair, 33 Ill. 194 (Af.).

People to use v. Lott, 36 Ill. 447 (R. R.).

The bill was filed against heirs of surety of administrator charging fraud in the administration. Bill was filed sixteen years after the account was filed in the probate court. Held: That the charges of fraud were not sustained. "Allowance against estate by probate court of a partnership debt must be considered at least prima facie proof, that firm assets were first applied in satisfaction and were insufficient for the payment of the partnership debts."

Phelps, Adm. v. Funkhouser et al., 39 Ill. 401 (Af.). Here administrator filed a bill to remove mortgage. Bill dismissed.

Rosenthal, Adm. v. Benick et al., 44 Ill. 207 (R. R.). Claim allowed in the probate court is prima facie evidence against heir.

Gridley v. Waloson, Adm., 53 Ill. 186 (Af.). Here administrator filed a bill to remove a cloud; point held to have been waived because an issue was made up.

Helm v. Cantrell, 59 Ill. 524 (Af.). Judgment is conclusive against or between creditor and administrator.

McCreedy v. Meer, 64 Ill. 49 (R.). Here doctrine is restricted. Higgins v. Curtiss, et al., 8 28 (Af.).

Gibson v. Gibson, 82 Ill. 61 (R.). Heir contested judgment. Administrator seeking to subject to sale for the payment of debt. Marshall et al. v. Rose, Adm. Ill. 374 (R. R.). Heirs on application to sell land may question justice of an award.

Ryan, Adm. v. Duncan, 88 Ill. (Af.). The administrator is only representative of the personal estate; real estate descends to heirs and the administrator has no power to apply for an order of sale.

Diversey, Adm. v. Johnson, 93 Ill. 547 (Af.); Brown v. Brown, Ill. 400 (R.).

People v. Brooks, 123 Ill. (Af.); Ward v. Durham, 134 Ill. 195 (Af.). Equity case to set aside claim allowed in the probate court. Noe v. Moutray, 170 Ill. 1 (Af.). A judgment versus an administrator is not a lien upon the land.

Smith v. Smith, 174 Ill. 52 (Af.). It is only with reference to personal property that the ancillary administrator is bound to account for to the principal administrator.

Ford v. First National Bank, 20 Ill. 120 (R.). Following Stone v. Wood, "The allowance of a claim against an estate is conclusive against the personal estate because the representative of the estate is before the court and party to it."

the land of the decedent to pay debts, the proceeding differs from a bill in chancery in the following particulars:

In acting the county court is not <sup>41</sup> in the possession of full and complete equity power, its right to act is conditioned on the petition containing all the averments of fact that the statute enumerates; <sup>42</sup> though no evidence is preserved in the record, no presumption will be indulged on review as to jurisdictional facts; <sup>43</sup> the order of sale is not <sup>44</sup> a decree, which under the Chancery Act would draw interest; section 19 of the Chancery Act, Chap. 22 <sup>45</sup> R. S. 1874, which allows a person who has not received a copy of the notice sent by mail to come in within one year, after notice in writing, etc., does not apply.

The Administration Act (section 99, Ch. 3 R. S. 1874) made the following provision for the sale of a decedent's land for the payment of debts: "The mode of commencing the proceedings for the sale of real estate in such cases shall be by the filing of a petition by the executor or administrator, in the county court of the county where letters testamentary or administration were issued. The widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservators of such as have conservators, and the actual occupants of the premises where the same or any part thereof are occupied, shall be made parties defendant. If

41—Bennett et al. v. Whitman et al., 22 Ill. 449 (R. R.); Moline Water Power Mfg. Co. v. Webster, 26 Ill. 233 (R. R.); Harding v. Le Moyne et al., 114 Ill. 65 (Af.).

42—Shoemate et al. v. Lockridge, 53 Ill. 503 (R. R.).

43—Wolf et al. v. Ogden, 66 Ill. 224 (R. R.).

44—Kippling v. Demint, 184 Ill. 165 (Af.).

45—Therens, Adm., Appellee v. Idem, 267 Ill. 592 (Af.).

In Wolf v. Ogden, it is said that what is said in Shoemate v. Lockridge with reference to "presumptions that evidence was heard to support the findings of the court" must be confined to "facts necessary to confer jurisdiction."

there are parties interested in the premises whose names are not known, then they shall be made parties to the proceedings in the names of unknown owners."

In 1887 (Session Laws p. 3) the legislature provided that those, too, should be made parties who held liens against the real estate described in the petition, or any part thereof."

Still further it was provided (section 101) "The court may direct the sale of such real estate, disincumbered of all mortgage, judgment or other money liens that are against it, and may provide for the satisfaction of all such liens out of the proceeds of sale, and may also settle and adjust all equities, and all questions of priority, between all parties interested therein, and may also investigate and terminate all questions of conflicting or controverted titles arising between any of the parties to such proceedings, and may remove clouds from the title to any real estate sought to be sold and invest purchasers with a good and indefeasible title to the premise sold. The court may, with the assent of any mortgagee of the whole or any part of such real estate, whose debt is not due sell such real estate disincumbered of such mortgage, and provide for the payment of such mortgage out of the proceeds of such sale; and may also, with the assent of a person entitled to an estate in dower, or by the courtesy, or for life or for years or of homestead to the whole or in part of the premises, who is a party to the suit, sell such real estate with the rest. But such assent shall be in writing and signed by such person and filed in the court wherein such proceedings are pending. When any such estate is sold the value thereof shall be ascertained and paid over in gross or the proper proportion of the funds invested, and the income paid over to the party entitled thereto during the continuance of the estate."

In *Newell, Adm. v. Montgomery et al.*, 129 Ill. 58, and



unsuccessful attack was made upon the validity of these amendments. It was claimed that it was an attempt to confer power upon the probate courts, within the inhibitions of sections 18 and 20 of article 6 of the constitution.

In sustaining the validity of the act as amended, the supreme court observes: "The Constitution, in conferring upon probate courts jurisdiction in cases of sales of the real estate of deceased persons for the payment of their debts, in no way attempts to define or limit the procedure in cases of that character. That is left entirely to legislative discretion. It was therefore competent for the general assembly to prescribe any procedure which in its judgment was appropriate. There was then no constitutional objection to assimilating it to that which obtains in courts of chancery."

## LACHES

What will amount to laches in the matter of an application to sell land to pay debts? In *Bursen et al. v. Goodspeed, Adm'r, etc.*, 60 Ill. 277 (Af.), an intestate died Jan. 1, 1856; letters were issued Feb. 5, 1856. Petition to sell not presented until Sept. 27, 1869. The question was whether the lien that creditors have to enforce their debts against the land of the decedent had not been lost by laches. Here it was held that the fact that there were intervening homestead and dower rights, that rendered an earlier application of sale unadvisable, was a sufficient explanation for the delay and that a sale might be had.<sup>46</sup>

<sup>46</sup>—*Bursen et al. v. Goodspeed, Adm., etc.*, 60 Ill. 277 (Af.).

A bill filed by an administrator cannot be the medium of a successful attack upon a conveyance by the decedent in fraud of creditors. *Majorowicz et al. v. Payson et al.*, 153

Ill. 484 (R. R.). The amendment of 1887 will not warrant it.

A person not known to be an heir of the decedent was omitted from the petition. Held that his rights were not affected. *Burr v. Bloemer*, 174 Ill. 638 (Af.).

SUCCESSFUL DIRECT ATTACK UPON DECREE OF SALE  
ADMINISTRATOR

If the petition is not filed at the term named in the notice, no decree will be warranted but a new notice be given in order to give the court jurisdiction.<sup>47</sup>

*Successful collateral attack* for failure to file petition at the term named in the notice. Sale void for want of notice. *Turner case*.<sup>48</sup>

UNSUCCESSFUL COLLATERAL ATTACK UPON ADMINISTRATOR'S  
SALE

Petition of an administrator tested collaterally in an ejectment suit.

In defense to an ejectment suit an administrator's deed, based upon a decree authorizing the sale of decedent's land, was interposed.

The court says that it was not the intention of the legislature to make the proceeding a chancery one. The allegations are then examined, and it is found that the allegations, required by the statute, are inserted and such being the fact, the court had power to act.

Failure to confirm the sale will not render the proceeding void. With reference to jurisdiction the court in *Moffitt et al. v. Idem*, 69 Ill. 641 (Af.) observes:

"The jurisdiction of the defendant, as all know, acquired by service or appearance; and the jurisdiction of the subject matter is acquired, in this class of cases, by the filing of the petition, by the executor or the administrator, containing the necessary allegations showing that the case requires the court, under the law to proceed, hear and to adjudicate on the facts."

47—*Turney et al. v. Turney*, Chicago, City of, 38 Ill. 382 (R.).  
Adm., 24 Ill. 625 (R.).                      *Burr v. Bloemer*, 174 Ill. 631

48—*Morris et al. v. Hogler et al.*, (Af.). No service upon one of the  
37 Ill. 150 (Af.); *Schnell et al. v.* heirs that made the attack.

The above case is cited in *Reinhardt v. Seaman et al.*, 208 Ill. 448, where a collateral attack was made upon administrator's sale. A widow had asked that the land be sold to pay her award. The widow bought at the sale and gave the administrator a receipt for the amount due her under the decree of allowance. Held that these facts did not amount to fraud in a collateral attack asking that the sale for that reason be set aside.<sup>49</sup>

COMPELLING HEIRS TO CONVEY REAL ESTATE WHO HAVE  
BECOME TRUSTEES BY VIRTUE OF THEIR RELATION  
TO THEIR ANCESTOR

Any person who shall have any debts, suits or demands against any person who shall make any fraudulent devise, or have a demand against any one who shall die intestate, and have real estate, may maintain action against heirs, executors, administrators, etc., and shall not be delayed in consequence of the non age of any of the parties.

Revised Statutes 1845, section 6, chap. 44.

Revised Statutes of 1874, section 11, chap. 59.

Reference to this statutory provision is found in *Enos v. Capp*, 15 Ill. 277.

Here the court observes: "A party having a right of action against the ancestor is not to be delayed in his remedy, because of the *non age* of those upon whom the law casts the liability. This provision takes away, not only the common law privilege of the heir to stay the action until he comes of age, but his right in equity to show cause against a decree after attaining his majority."<sup>50</sup>

Equity and law remedies are thus put upon the same footing.

<sup>49</sup>—*Moffitt et al. v. Moffitt*, 69 Ill. 641 (Af.).

<sup>50</sup>—*Enos v. Capps*, 15 Ill. 277. Writ of error dismissed.

## LIMITED EQUITY POWER—POSSESSION OF ASSETS BY ST

Section 90, Revised Statutes 1845, Chap. 109, § 1, Sec. 81, Chap. 3, R. S. 1874:—

This section provides "if any executor, administrator or other person interested in any estate, shall state oath, to any county court that he believes that any person has in his possession, or has concealed or embezzled any goods, chattels, moneys, or effects, books of account, papers, or any evidences of debt whatever, or titles of lands, belonging to any deceased person; or that he believes that any person, has any knowledge or information of or concerning any indebtedness or evidence of indebtedness, or property titles or effects, belonging to any deceased person, which knowledge or information is necessary to the recovery of the same by suit or otherwise, by the executor or administrator, of which the executor or administrator is ignorant and that such person refuses to give to the executor or administrator such knowledge or information, the court shall require such person to appear before it by citation and may examine him on oath, and hear the testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the court may require."

The proceeding authorized by this statute is analogous to a bill of discovery in a court of equity. Since the enactment of the statutes (1861, p. 71; and 1867, p. 186) allowing parties to the record and parties in interest to testify, bills of discovery are less frequently resorted to than formerly.<sup>51</sup>

It is only contracts to which the decedent is a party or matters about which he would be competent to testify if living, and not contracts involving third parties not in privity with the decedent, that fall within the purview

51—Brown v. Hurd, 41 Ill. 121.

of this statute under the constitution. It cannot be resorted to in any instance where at common law the facts would have to be submitted to a jury. Under its limited jurisdiction a probate court has no power to empanel a jury to whom the facts can be submitted, hence the scope of the inquiry can be no broader than under an ordinary bill of discovery.<sup>52</sup>

#### WILLS, TESTAMENTS AND DEVISES

The mode of conveying real estate to take effect at death, under the common law practice was by devise, which did not need to be authenticated or established by any act of the ecclesiastical court, but a will that named an heir and disposed of personalty had to be proved in that court in order to be valid.<sup>53</sup> As most wills of land also contained a disposition of personalty, it early became a custom to prove them, as is done at the present time.

The constitution of 1870<sup>54</sup> provides that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and deceased persons." By statute, under the constitution, the probate court has exclusive original jurisdiction of the probate of wills. A court of equity has no jurisdiction to establish a lost or destroyed will.<sup>55</sup> The same constitution also provides: "The right of trial by

52—*Selectmen, etc. v. Boylston*, 4 Mass. 322; *Dinsmoor v. Bressler*, 164 Ill. 211 (R. R.); *Martin v. Martin*, 170 Ill. 18 (R. R.); *Moore v. Brandenburg*, 248 Ill. 232 (R. R.).

53—3 *Greenleaf's Cruise Title*, 38 *Devise Chap. 1*; *Luther et al. v. Luther et al.*, 122 Ill. 558 (Af.).

54—Article 6, Sec. 18.

55—*Wild, Exr. v. Sweeney et al.*, 84 Ill. 213 (Af.); *Dean v. Dean, Ex'trix*, Appellant, 239 Ill. 424 (Appeal Dismissed); *People ex rel. v. Knickerbocker*, 114 Ill. 539; *Beatty v. Clegg et al.*, 214 Ill. 34 (Af.); *Schofield v. Thomas*, 231 Ill. 114 (R. R.); *Mather v. Minard*, 260 Ill. 175 (R. R.).

jury as heretofore enjoyed, shall remain inviolate.”<sup>56</sup> As the two prior constitutions contained a like provision, this reference must be to the common law right of trial by jury as it existed at the time of the adoption of the first constitution. It is held by the supreme court that the common law and the statutes of England, so far as they were in force<sup>57</sup> at the adoption of the constitution of 1818, were repealed by the legislature, when it enacted a statute in regard to wills and the descent of property.<sup>58</sup> Hence the right to take property by will or descent is wholly statutory in this state.

Under the common law, as between heir and devisee, the facts relating to the execution of a devise must be submitted to a jury before a judgment of ouster or sustaining its validity could be rendered.

The legislature, however, has enacted that a will to be “available in law for the granting, conveying and assuring the lands, tenements and hereditaments must be proven to the satisfaction of the (county) court,” and declares: Before the will can be admitted to *record* it must appear:

1st. It was reduced to writing.

2nd. Signed by the testator.

3rd. Attested in the presence of the testator—by two or more *credible* witnesses.

Witnesses must declare on oath or affirmation before the *county court* of the proper county that:

a They were present and saw the testator sign;

b Or acknowledge the same to be his act and deed;

c That they *believe* the testator to be of sound mind and memory at the time of the signing, etc.<sup>59</sup>

The county court on its probate side, though a court

56—Article 2, Sec. 5, Con. 1870.

57—R. S. 1833, p. 425; R. S. 1845, p. 337; R. S. 1874, p. 269.

58—Kochersperger v. Drake, 167 Ill. 122 (R. R.); In re Mulford, 217

Ill. 242 (Af.); North v. Graham, 235 Ill. 178 (Af.); In re McWhirter, 235 Ill. 607 (Af.).

59—Sec. 2, p. 536, R. S. 1845; Sec. 2, p. 1101, R. S. 1874.

of record, is a court of limited jurisdiction<sup>60</sup> with no statutory provision for empaneling a common law jury to whom the facts with reference to the execution of a devise can be submitted. Though there is a provision of statute<sup>61</sup> for an appeal "from the order of the county court, allowing or disallowing any will to probate, to the circuit court of the same county, by any person interested in said will, in the same time and manner as appeals may be taken from justices of the peace," the same limitation of power surrounds the circuit court as did the county court on the original hearing. The circuit court sits as a court of probate. One man, not twelve, must weigh the facts that relate to the execution of the devise.

This statutory inquiry by the probate court, in reference to certain facts surrounding a testator at the time of the execution of a will, before the same can be recorded so far as it affects the title to real estate, is analogous to the examination of a grantor of a deed by a qualified officer before making a certificate in authentication of said deed. Any other conclusion would necessitate holding that a probate judge could make a finding of fact equal in potency to the verdict of a common law jury.

Prior to 1904 the supreme court yielded tacit recognition of the *erroneous* practice of submitting to a jury the facts relating to the execution of a will, when the circuit court is sitting in review of the act of the probate court.<sup>62</sup> Since that date the holding in the language of the court has been: "The Statute of Wills in force in this state does not provide for a trial by jury in the

60—*Probst v. Meadows*, 13 Ill. 157 (R.).

61—Sec. 138, p. 564, R. S. 1845; Sec. 14, p. 1104, R. S. 1874.

62—*Walker v. Walker*, 2 Scam. 291 (Af.); *Dickie et al. v. Carter*,

42 Ill. 376 (Af.); *Yoe v. McCord*, 74 Ill. 33 (R. R.); *Crowley v. Crowley*, 80 Ill. 439 (Af.); *Reynolds et al. v. Adams*, 90 Ill. 134 (R. R.); *Webster v. Yorty*, 194 Ill. 408 (R. R.).

county court upon the presentation of a will for probate, but the question whether or not an instrument in writing has been duly established as the last will and testament of a decedent, and is entitled to be admitted to probate, is left to the determination of the county court with or without a jury. Neither does the statute providing for appeals from the judgment of the county court in admitting or refusing to admit wills to probate provide for a trial by jury in the circuit court, but the same issues are involved in the circuit court upon appeal which were tried in the county court, and those issues, on appeal, are to be determined by the circuit court without a jury, the same way they were tried without a jury and before the county court." <sup>63</sup>

What is meant by "in the presence of two witnesses" is illustrated in *In re Tobin*, 196 Ill. 484, which was a successful direct appeal from an attack upon a decree of the circuit court refusing admission to probate of a will, the court observes: "In the case of *Witt v. Gardiner*, 158 Ill. 176, the rule as to what constitutes the 'presence' of the testator, within the meaning of the statute, was considered and settled. The rule as so determined is, that 'contiguity with an uninterrupted view between testator and subscribing witnesses is the indispensable element of the physical signing of the will in the presence of the testator.' It is immaterial that he does not see, if he might have done so; but no mere contiguity of the witnesses will be sufficient if the testator can not see them sign. Nothing will constitute a 'presence,' within the meaning of the statute, unless the testator can

63—*Moody v. Found. Exr.*, 208 Ill. 78 (Af.); *Schofield, Appellee v. Thomas*, 231 Ill. 114 (R. R.); *Schofield, Appellee v. Thomas*, 236 Ill. 417 (R. R.).

See *Hicks v. Deemer*, 187 Ill. 164. Action on the case for damages to land. Plaintiff offered what purported to be an original will (devise)

without any evidence that it had ever been admitted to probate. Held: Circuit Court erred in admitting it.

The Act of 1897 makes the probating of a will a proceeding *inter partes*, when before, it was a proceeding *in rem*. *Schofield v. Thomas*, 231 Ill. 114.



from his actual position, see the act of attestation.

\* \* \* The act of attestation must be performed within the range of the testator's vision, and in such a way that he could know that it was his will which was being attested and could see the act of signing."

It is the act of "attestation" that must be seen by the testator and not merely the witnesses.

#### TESTIMONY OF THE WITNESSES

Two witnesses must swear that they saw the testator sign; if they did not actually see him write his name, then the testator must have indicated as much by some act or word.<sup>64</sup>

If a written instrument is exhibited to the witnesses, calling it "my will" and asking them to sign as witnesses, it will be presumed, in the absence of counter-vailing proof, that signature of the testator had previously been written.<sup>65</sup>

#### ELEMENTS OF PROOF NECESSARY TO ESTABLISH WILLS BEFORE THE COUNTY COURT

1st. The will must be in writing and signed by the testator. 2nd. It must be attested by two credible wit-

64—Allison v. Allison, 46 Ill. 61 (reversed on point that subscribing witness did not express what his belief was as to mind of testator); Masonic Orphans' Home v. Gracy, 190 Ill. 95 (R. R.); In re Will of Barry, 219 Ill. 391 (R. R.).

65—Hobart v. Hobart et al., 154 Ill. 610 (Af.); Gould v. Theological Seminary, 189 Ill. 282 (Af.); Thompson v. Karne et al., Appellee, 269 Ill. 168 (R. R.).

For weight to be given to the attesting clause, when the witnesses have no recollection as to the facts

surrounding the execution of the will except that they recognize their own signatures as genuine, see Thompson v. Owen, 174 Ill. 229, reversed in favor of the proponents of the will.

Gould v. Chicago Theo. Seminary et al., 189 Ill. 282. Reversed in favor of proponents. When attesting clause can be used to contradict subscribing witnesses see In re Will of Barry, 219 Ill. 391; Britton, Exr., Appellee v. Davis, 273 Ill. 31 (Af.).

One witness is sufficient to prove

nesses. 3rd. Two witnesses must swear that they saw the testator or testatrix sign in their presence, or that he or she acknowledged the same to be his or her act and deed. 4th. The witnesses must swear that they believed at the time of the execution that the testator or testatrix was of sound mind and memory.<sup>66</sup>

*Competency of witnesses.* The statute uses the term credible. By this is meant "competent." The test of competency is: Will the witness gain or lose financially by the admission or rejection of the will?<sup>67</sup> The husband or wife of a devisee is not a competent witness.<sup>68</sup> Their competency must be determined by the facts and circumstances as they existed at the time of the execution of the will. If the witnesses to a will are also named as executors of said will, they can be compelled under section 8 of the Statute of Wills to testify with reference to its execution but they can not thereafter, if the will is admitted to probate, act as executors.<sup>69</sup>

WITNESSES MUST BELIEVE—MEANING AND SCOPE OF THIS  
TERM

*Allison v. Allison*, 45 Ill. 61, was reversed and remanded because one of the witnesses testified that he did "not know whether" testator "was of sound mind or not—he might have been or might not." It was held

the contents of a lost will. See *In re Page*, 118 Ill. 576.

See *In re Kohley*, 200 Ill. 189; *Kaul et al., Appellee v. Lyman*, 259 Ill. 30 (Af.), as to weight to be given the attesting clause.

66—*Dickie et al. v. Carter*, 42 Ill. 376 (Af.); *Crowley v. Crowley*, 80 Ill. 469 (Af.); *Canatsey et al. v. Canatsey et al.*, 130 Ill. 307 (Af.).

67—*Fisker et al. v. Spencer et al.*, 150 Ill. 253; *Sloan v. Sloan*, 184 Ill. 579 (Af.); *Boyd et al. v. Connell*

et al., 209 Ill. 396 (Af.); *O'Brien v. Bonfield*, 213 Ill. 428 (Af.).

68—*Sloan v. Sloan*, 184 Ill. 579 (Af.); *Gump v. Gowans et al.*, 226 Ill. 635 (Af.); *Fearn, Appellee v. Postlethwaite*, 240 Ill. 626 (B.R.).

69—*Jones, Appellee v. Grieser*, 238 Ill. 183 (Af.); *Rowlett et al., Plaintiff in Error v. Moore et al.*, 252 Ill. 436 (Af.). See amendment to Sec. 8, Statute of Wills, *Laws* 1911, p. 538. *In re Will of Delavergne*, 259 Ill. 589 (Af.).

that it was not necessary for the witness to have absolute knowledge upon the point. But he doubtless had some opinion on the subject, and he should have been so interrogated as to have drawn out that opinion or, as expressed in the statute his "belief." It is essential to sustain the decree ordering a will to be recorded, that the record show what the witnesses believed with reference to the state of mind of the testator at the time of the execution of the will.<sup>70</sup>

With reference to the point that parties in interest have a right, on the hearing in the probate court, to examine the subscribing witnesses, see *Duncan et al. v. Duncan*, 23 Ill. 364.

And with reference to "when proof of a codicil will be sufficient to establish the will," see *Idem* case and *Hobart v. Hobart, et al.*, 154 Ill. 610; *Hill et al. v. Kehr et al.*, 228 Ill. 204. *Hubbard v. Hubbard*, 198 Ill. 621 (Af.). *Fry v. Morrison*, 159 Ill. 244 (Af.).

#### WILLS DENIED RECORD BY THE PROBATE COURT—REVIEW OF THE ORDER IN THE CIRCUIT COURT

In consequence of the supreme court holding (*Walker v. Walker*, 2 Scam. 291), on appeal from the Court of Probate of Cook County ordering that a will be rejected and not admitted to probate, that the "subscribing witnesses should alone be permitted to testify to the *mental* condition of the testator," the legislature in February, 1845, provided in substance <sup>71</sup> upon appeal from an order of the probate court refusing probate of a will, it shall be competent for the *party seeking* the probate of the

70—In *re Ingalls*, 148 Ill. 287 (R. R.); *Hill v. Kehr*, 228 Ill. 204 (R. R.); In *re Noble*, 120 Ill. 266 (Af.).

See Session Laws 1897, p. 304 and 1909, p. 473, changing the ceremony of probating a will from a proceed-

ing *in rem* to *inter partes*. *Mosser, Appellant v. Flake et al.*, 258 Ill. 233 (R. R.) and *Conzet et al., Appellants v. Hibben et al.*, 272 Ill. 508 (Af.).

71—Session Laws 1845, p. 30, R. S. 1874, p. 1104, Sec. 13.

will, to support the same, on the hearing in the circuit court, by any evidence that would be admissible in a proceeding in chancery to contest the will. In 1909 the legislature provided that the same privilege on appeal from the probate court should be accorded the party resisting, as formerly had been granted the party seeking, probate.<sup>72</sup>

The parties who resist the probate of a will have a right to appear and cross examine the subscribing witnesses and offer any proof tending to show "fraud, compulsion or other improper conduct" connected with the execution of the will. They can not call witnesses or offer proof in reference to the mental condition of the testator, for the reason that, if the will is sustained by the circuit court, they have a right to contest the will by bill in chancery, under the statute.<sup>73</sup>

#### SUCCESSFUL COLLATERAL ATTACK UPON A DECREE ADMITTING A WILL TO PROBATE

In an action of ejectment a certified copy of a will was offered. The supreme court in sustaining its non-admission observes: "Courts of probate have exclusive jurisdiction over the personal estate, but have none over the realty. Accordingly, another distinction has been taken, as to the effect of a probate, in the case of *Bogardus v. Clark*, 4 Paige 625, that it is conclusive between the parties litigating it as to the personalty, but not even

72—Session Laws 1909, p. 472, original Sec. 13 amended; *Duncan et al. v. Duncan*, 23 Ill. 364 (R. R.).

73—*Andrews et al. v. Black et al.*, 43 Ill. 256 (Af.); *Weld, Exr. v. Sweeney*, 85 Ill. 50 (Af.); *Bice v. Hall*, 120 Ill. 597 (R. R.); *Heirs of Critz v. Pierce*, 106 Ill. 167 (Af.); *Thompson v. Owen*, 174 Ill. 229 (R.

R.); *Gould v. Chicago Theo. Seminary*, 189 Ill. 282 (Af.); *Illinois Masonic Orphans' Home v. Tracy*, 190 Ill. 95; *In re Estate Kohley*, 200 Ill. 189; *Kaul et al., Appellee v. Lyman*, 259 Ill. 30 (Af.).

See *Conzet v. Hibben*, 272 Ill. 508. Later, will denied probate.

then as to the realty, for over that the surrogate had no jurisdiction."

Further the court observes: "We are of the opinion that this will is insufficiently proven to pass the title to land, and that it is competent for the defendant to object to it on that ground, on the trial in this ejectment." <sup>74</sup>

In *People v. Knickerbocker*, 114 Ill. 539, a petition for a writ of mandamus to a judge to proceed and make final order upon probating a will, was denied because the act was "judicial" and not, as under the statute of 1819, "ministerial" and that no clear right for the writ had been shown.

Under the act of June 3, 1897, which requires that the clerk of the court shall send notice of the time and place of the hearing under petition filed, giving the names and place of residence of the heirs at law, it is held that heirs, who are not notified, may come in at a subsequent term and attack successfully the decree of probate. <sup>75</sup>

UNSUCCESSFUL COLLATERAL ATTACK UPON A DECREE  
ADMITTING A WILL TO PROBATE

In *James White Memorial Home et al. v. Price et al.*, 195 Ill. 279 (R. R.), the probate court refused to admit to record the will of one Lucy Price. A party, not named as legatee in the will, perfected an appeal to the circuit court, which resulted in an order of probate. In a partition proceeding, this order was attacked on the ground that the party taking the appeal was not named as legatee and had no interest in the will. The supreme court, in holding that the decree could not be successfully attacked, observes: "Although the name of the appellant did not appear in the will, and although the bill (bill for partition) alleges that it was not interested in the will, still there was a sufficient averment of interest in the

<sup>74</sup>—*Ferguson et al. v. Hunter*, 2 Ill. 56 (Af.); *Floto v. Floto*, 213 Ill. 438 (R. R.); *Mosser v. Flake*, 74 Ill. 657 (Af.).

<sup>75</sup>—*Wright et al. v. Simpson*, 200 Ill. 233.

appeal bond itself, by the claim that the appellant association was a legatee in the will, to call for the exercise of the jurisdiction of the circuit court to hear and determine the matter of said appeal. If, as a matter of fact, the appellant association was not interested in the will, the circuit court, on ascertaining that fact, would have dismissed its appeal. That court clearly had the power to pass on the question of fact whether the appellant association was interested in the will or not, and if it decided, however erroneously, that the appellant association was interested in the will, and then decided, however erroneously, to admit the will to probate, its rulings and judgment in the premises could not be collaterally attacked."

In *Keister v. Keister*, 178 Ill. 103, the allegations, in what purported to be a bill for partition, were that the will was not properly probated and that letters testamentary were improperly granted. It was held that these allegations were mere conclusions of the pleader and that, however irregular the probate proceedings may have been, they must stand as sufficient when assailed collaterally.

In *Chicago Title & Trust Co. v. Brown et al.*, 183 Ill. 42 (R.), a will was admitted to probate and seven years thereafter a petition was filed in the probate court asking to have the probate set aside on the alleged ground that one of the witnesses was the husband of a legatee named in the will. It was held that the act of the probate court, in taking the testimony of the husband was erroneous but it did not render the order admitting the will to probate void, but only subject to be reversed on appeal.

#### FOREIGN WILL—STATUTORY NOTICE

Chap. 30, Sec. 33, R. S. 1874.

Lands may be safely purchased from heirs, whose ancestor died testate in a foreign state, and whose will is

probated in said foreign state, if the purchaser has no *actual notice*, or knowledge of facts that would put him on inquiry, of the rights of devisees and "no original will, accompanied with a certificate, that it was duly executed in conformity with the laws of the foreign state duly proved, or copy duly certified, according to the law and exemplifications of the record of foreign wills made in pursuance of the law of congress in relation to records in foreign states," is recorded in the recorder's office of the county, where the land is situated.<sup>76</sup>

In *Bliss v. Seeley et al.* 191 Ill. 461, the point is emphasized that under section 9 of the Act on Wills, and section 33 of the Act on Conveyances the recording does not operate as notice to third persons, acquiring interests adverse to the devisees, where the certificate of the foreign clerk omits to state that the will "was duly executed and proved agreeable to the laws and usages" of the state or country where the will was executed.

In the following cases (*Shephard v. Carriel*, 19 Ill. 313; *Gardner v. Ladue*, 47 Ill. 211, and *Newman v. Willetts*, 52 Ill. 98), foreign wills, which have been probated and certified as required by the ninth section of chapter 148 or section 8, R. S., 1845, p. 538, seem to have been successfully used as muniments of title to land located in Illinois. Held in *Bliss* case: They do not militate against the rule stated above as to notice.

76—*Harrison v. Wetherby*, 180 Ill. 434 (Af.); *Bliss v. Seeley*, 191 Ill. 471 (Af.); *Weigel v. Green et al.*, 218 Ill. 227 (Af.); *Catholic University v. Boyd*, 227 Ill. 281 (Af.); *Stall v. Veatch*, 236 Ill. 207; *Dibble et al., Appellants v. Winter*, 247 Ill. 243 (R. R.).

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## FOREIGN WILL AS A MUNIMENT OF TITLE

Devises, in their validity and construction, controlled by the law and courts where the land is located.<sup>77</sup>

## FOREIGN WILLS

Statutory provision in reference to vesting title thereunder to real estate in Illinois.

"All wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, accompanied with the certificate of the proper officer or officers, that said will, testament, codicil or copy thereof, was duly executed and proved, agreeable to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this state." Sec. 8, R. S., 1845; sec. 9, R. S., 1874. It is held that the statute above has changed the common law rule that an instrument to pass the title to real estate must conform to the law of the place where the real estate is located.

Under this statute it is held that the properly authenticated copy of the will must be recorded in the office of the probate court clerk. It is not enough to vest title in the devisee to file the copy in the recorder's office as provided by section 33 of the Conveyance Act.<sup>78</sup>

77—Story on Conflict of Laws, Sec. 474; *United States v. Crosby*, 7 Cranch 115-3 L. 287; *Kerr v. The Devises of A. Moon*, 9 Wheat. 565-6 L. 161; *McCormick et ux. v. Sullivan et al.*, 10 Wheat. 192; *Robertson et al. v. Weatherby et al.*, 180 Ill. 418 (Af.); *West v. Fitz*, 109 Ill. 425 (R. R.); *McCartney v. Osburn*,

118 Ill. 403 (R. & A.); *Osburn et al. v. McCartney*, 121 Ill. 408 (Af.); *Parsons v. Millar*, 189 Ill. 107 (R. R.); *Fulsom v. Board of Trustees*, 210 Ill. 404 (Af.); *Amrine v. Hammer*, 240 Ill. 572 (Af.); *Dibble et al., Appellants v. Winter*, 247 Ill. 243 (R. R.).

78—*Stull et al., Appellants v.*



*Contesting a will by bill in chancery.* Sections 7 and 9, chapter 148, Revised Statutes, 1874.

After reviewing the previous authorities (Selden, Exr., et al. v. The Illinois Trust & Savings Bank et al., 239 Ill. 67), the court says: "It is the settled law (1) that it is not by virtue of the general chancery powers that courts of equity in this state are given jurisdiction of will contests, but such jurisdiction is derived solely from the statute; (2) that no action to contest a will can be brought by any one except a person that was interested at the time the will was admitted to probate; (3) that the cause of action is not assignable or the subject of conveyance and does not pass by inheritance or descent."

On the hearing, the burden of proof<sup>79</sup> is upon the party affirming the validity of the will; a copy of the order<sup>80</sup> of the probate court admitting the will to probate is not admissible; in its nature the contest is a proceeding *in personam*,<sup>81</sup> and not *in rem* as is the proceeding in the county court.

The jurisdiction of courts of chancery to entertain a bill to contest a will is solely by virtue of the statute, and the bill must be filed within the time named in the statute.<sup>82</sup>

By opinion filed April 15, 1919, Lewark, Appellee v. Dodd, et al., 288 Ill. 80 (R. R.), it was decided for the first time that a will, which is set aside in response to a bill filed by a party within the saving clause of section 7, re-

Vestch et al., 236 Ill. 207 (Af.);  
Amrine v. Hamer, 240 Ill. 572  
(Af.); Barnett, Appellee v. Barnett  
et al., 284 Ill. 580 (R. R.).

79—Riggs v. Wilton, 13 Ill. 15  
(R. R.); Egbers et al. v. Egbers et  
al., 177 Ill. 82 (Af.).

80—Purdy v. Hall et al., 134 Ill.  
298 (R. R.); Davidson v. Upson,  
209 Ill. 206 (R. R.).

81—Wright v. Simpson, 200 Ill.  
56 (Af.) and Simpson et al. v. Idem,  
273 Ill. 90 (Af.).

82—Luther et al. v. Luther et al.,  
122 Ill. 558 (Af.); also Jele v.  
Lemberger, 163 Ill. 338 (R. R.);  
Calkins et al. v. Calkins et al., 229  
Ill. 68 (Af.); Waters et al. v. Wa-  
ters et al., 225 Ill. 559 (Af.).

mains in force as to all adults whose right of contest has been lost by lapse of time.

A foreign will, that contains a devise of land in Illinois, when a copy is filed as required by section 9 of chapter 148, is subject to contest, the same as is a domestic will under section 7 of said chapter.<sup>83</sup>

The mental condition of the testator, influences present and acting at the time of execution and his environment prior to the act have for the most part been made the subject of judicial examination through the medium of a bill in equity in pursuance of the statute.<sup>84</sup> As there is no inherent power in a court of equity to set aside a will or a devise, the petition for its exercise must be made within the limited time prescribed by the statute and in conformity thereto. The proceeding by bill differs from the application for probate, in that the former is an attempt to impeach the will, while the latter is an attempt to establish a will.<sup>85</sup>

"Any person interested" may contest the will. This includes the grantee of an heir of the testator. *Cassem v. Prindle et al.*, 258 Ill. 11.

#### DEVISE OF AFTER ACQUIRED LAND

At common law and under the statute of Henry VIII after acquired land would not pass by a devise. "Dispositions by will was assimilated to a common law conveyance, and required a seisin in the testator to pass the

83—*Dibble et al. v. Winter*, 247 Ill. 243.

84—Sec. 7, Chap. 148, R. S. 1874.

85—*Wolf v. Bollinger*, 62 Ill. 368 (Af.); *Shaw v. Moderwell*, 108 Ill. 64 (Af.); *Wheeler v. Wheeler*, 134 Ill. 522; *Sinnett et al. v. Bowman et al.*, 151 Ill. 146 (R. R.); *Spaulding v. White*, 173 Ill. 127 (Af.).

Although the statute says (R. S. 1874, Chap. 148, Sec. 7) in a will

contest, when the issue is made up, it "shall" be tried by jury, it is competent for the parties to waive a jury and submit the facts to the court. *Whipple, Exr. v. Eddy*, 161 Ill. 114 (R. R.).

"Any person interested" may contest the will. This includes the grantee of an heir of the testator. *Cassem v. Prindle et al.*, 258 Ill. 11.

title." But the statute (1) provides that all testators can devise "all the estate, right, title and interest, in possession, reversion or remainder, which he or she hath at the time of death."

In *Peters et al v. Spillman*, 18 Ill. 370, in an action of ejectment, where a will was offered as a muniment of title, in referring to this statute the court thus observes: "The power to dispose of and convey land by will is a *statutory*, and not a common law power, and must, therefore, depend for its extent upon legislative intention, as indicated by and contained in the frame of the act. The English Acts, 32 Henry VIII, and 34 and 35 Henry VIII, and I presume it is so in those states of the Union which have adopted these acts in substance, did not dispense with the common law requisite of seisin to enable a party to convey, which was as essential by will as by deed. Under those statutes it was, therefore, a question of power, and it was held that a testator could not pass after acquired lands without a republication of his will, with proper language to include such lands, and with all the solemnities essential to the original execution and publication of his will."

In *Willis et al. v. Watson et al.*, 4 Scam. 64, we have settled the true construction of our statute of wills (Rev. Stat., p. 536, Sec. 1) and conveyances (*Idem*, p. 102, Sec. 1) as enabling a testator to convey by will after acquired lands without republication. It is, therefore, a mere question of *intention* in the testator to pass such lands, and not a question of *power* when the intention is clear."<sup>86</sup>

#### CITING A GUARDIAN TO ACCOUNT

The citation of a guardian to account under the statute is not a suit at law; it is like or similar to a bill in chan-

<sup>86</sup>—*Williams v. Johnson*, 112 Ill. 61 (R. R.); *Decker v. Decker*, 121 Ill. 341 (R. & A.); *Missionary Society et al. v. Mead et al.*, 131 Ill. 338 (R. R.).

cery for discovery, and questions of fact will be reviewed in the supreme court.

A proceeding for an accounting by a guardian was begun in the county court and taken through the circuit and appellate courts. In the supreme court, it was contended that the proceeding was law, and consequently the finding of the appellate court upon the facts was final. The court, after referring to the fact that in chancery cases the rule of law does not obtain, thus observes: "We think that the same rule should prevail in respect to accounting by a guardian in the probate court, since it is, in substance, a chancery proceeding. The late case of *Kingsbury v. Powers*, 131 Ill. 182, was like this, a proceeding in that court for the final settlement of the accounts of a guardian, and this court took cognizance of the questions of fact as well as law in contention."<sup>87</sup>

#### SALE OF WARD'S LAND

Sale by a guardian does not pass any title unless the sale is approved by the court. Equity will not relieve against an ejectment suit by the heir, though the purchaser has paid money, where a bill does not show that the money was used to support the minor.

In *Loyd et al. v. Malone et al.*, 23 Ill. 43 (R. R.), on collateral attack it was held that the sale of the land of a minor would be set aside if there was no proof in the

<sup>87</sup>—*Cheney v. Roodhouse*, 135 Ill. 257 (Af.).

For rule of charging interest against a guardian in final settlement see *Gilbert v. Guptill*, 34 Ill. 112 (R. R.); *In re William Steele et al.*, 65 Ill. 322 (R. R.); *Millard v. Harris*, 119 Ill. 185.

See *Chapman et al., Plaintiff in Error v. Am. Surety Co.*, 261 Ill. 594, where on bill filed by a guard-

ian, the court of equity took the settlement and adjustment of a guardian's account out of the control of the probate court, because it involved matters beyond the limited jurisdiction of the probate court.

A proceeding to remove a guardian is statutory; in its nature equitable; no right to a jury trial or to submit propositions of law. *Wack-erle v. People*, 168 Ill. 250 (R. R.).

record that it was necessary to sell the land for the education or support of the minor.

On direct attack of a sale by a guardian of a minor's land, a non-compliance with a requirement of the statute, as for instance, making application, for leave to sell the land of a non-resident, outside of the county where the land is located, will render erroneous a decree of confirmation.<sup>88</sup>

Likewise allowing one to act as guardian, whose interests are hostile, or a failure to observe the directions in the decree as to advertising sale, will render erroneous the confirmation decree.<sup>89 and 90</sup>

Mere inadequacy of price, when there is no element of fraud or unfairness in the sale of a minor's land, and that, too, when there is no money brought into court or any binding assurance that more will be realized if the land were again exposed for sale, will not justify withholding confirmation.<sup>91 and 92</sup>

When the law would have pronounced confirmation on a guardian's sale, if applied for at the time of the sale, a delay of seventeen years, when there is no bad faith involved or harm to be done, it will be error to refuse confirmation.<sup>93</sup>

The principles under which collateral attacks upon sales made by guardians have succeeded, are, in *Young et al. v. Dowling*, 15 Ill. 481, thus stated:

"It was the manifest policy of the law to make the court the special guardian of the infant, to see that he was not defrauded by his general guardian or others. This policy of the law must be upheld. The statute alone created the power to sell the land, and required that it

88—*Spellman et al. v. Dowse*, 79 Ill. 66 (R. R.).

89—*Roodhouse v. Roodhouse et al.*, 132 Ill. 360 (R. R.).

90—*Wilson v. Ford*, 190 Ill. 614 (R. R.).

91—*Ayers v. Baumgartner*, 15 Ill. 444 (R. R.).

92—*Kiebel et al. v. Leick et al.*, 216 Ill. 474 (Af.).

93—*In re Harvey*, 16 Ill. 127 (R. R.).

should be exercised in a particular way to make it valid, and in no other way can it acquire validity. \* \* \* Now it is a well settled doctrine, that although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the *defective execution of a power created by law*, or dispense with any of the formalities required thereby for its due execution, for otherwise the whole policy of legislative enactments might be overturned."

The principle which has been invoked to sustain guardian's sale when attacked collaterally is: There does appear in the petition, or at least somewhere in the record, all the statutory averments necessary to call upon the court to act, or findings of fact appear that show that the court was called upon to act in pursuance of the power conferred by statute. Assuming, of course, jurisdiction of the parties.<sup>94, 95</sup>

**SUCCESSFUL COLLATERAL ATTACK IN LAW (EJECTMENT) UPON  
STATUTORY PROCEEDINGS THAT SUPPORT DEEDS BY ADMINIS-  
TRATORS, SHERIFFS, TAX DEEDS, DEVISES, CONDEMNATION  
PROCEEDINGS AND MANDAMUS PROCEEDINGS.**

A collateral attack will be sustained under the following conditions: If the statute requires an administrator's deed to set forth at large the order of sale, and this is omitted;<sup>96</sup> if a decedent's land is attempted to

94—Young et al. v. Keogh, 11 Ill. 642 (R. R.); Young et al. v. Dowling, 15 Ill. 481 (R. Bill dismissed); Rawlings v. Bailey et al., 15 Ill. 178 (R. R.); Musgrave et al. v. Conover, 85 Ill. 374 (R. R.).

95—Young et al. v. Lorain et al., 11 Ill. 624 (R. R.); Fitzgibbon et al. v. Lake et al., 29 Ill. 165 (Af.); Mulford et al. v. Stalzenbach et al., 46 Ill. 303 (Af.); Conover v. Mus-

grave et al., 68 Ill. 58 (R. R.); Mulford et al. v. Beverage et al., 78 Ill. 455 (Af.); Spring v. Kane, 86 Ill. 580 (Af.); Benefield v. Albert, 132 Ill. 665 (Af.); Reid et al. v. Morton, 119 Ill. 118 (Af.); Field v. Peebles et al., 180 Ill. 376 (R. R.).

96—Smith et al. v. Hileman, 1 Scam. 323 (R.).

be sold under an act of the legislature;<sup>97</sup> if a devise is offered supported alone by the judgment of the county court admitting it to probate;<sup>98</sup> if, in a tax proceeding, the assessor fails to complete his assessment and make his return on or before the time fixed by the statute;<sup>99</sup> if, in a tax proceeding, the publication notice (summons) does not contain all the statutory requirements;<sup>1</sup> if, in a tax proceeding, the certificate of the publisher (return on summons) is omitted or defective;<sup>2</sup> if, in a tax proceeding, the delinquent list (declaration) is not filed within the time named in the statute, or the details, as to amount of tax and time when due, etc., are omitted;<sup>3</sup> if, in a tax proceeding, the judgment record fails to "employ any words, marks, figures or characters denoting for what sum the judgment was rendered or the precept was issued";<sup>4</sup> if the description in the sheriff's deed is uncertain;<sup>5</sup> if, in a tax proceeding, a levy is made by the county commissioners' court at the June term in place of the March term, as directed by statute;<sup>6</sup> if the record shows a defective service and there is no finding that the court had jurisdiction, notwithstanding;<sup>7</sup> where a *scire facias* has been issued to make one party to a judgment and is not served and the land of the party not served under a writ of attachment in aid is sold;<sup>8</sup> where the petition in a condemnation proceeding does

97—*Lane et al. v. Dorman et ux.*, 3 Scam. 238 (Af.).

98—*Ferguson et al. v. Hunter*, 2 Gil. 657 (Af.).

99—*Marsh v. Chesnut*, 14 Ill. 223 (R. R.).

1—*Charles v. Waugh*, 35 Ill. 315 (Af.); *Pickering v. Lomax et al.*, 120 Ill. 289 (Af.).

2—*Senichka v. Lowe*, 74 Ill. 274 (Af.).

3—*Morrill v. Swartz*, 39 Ill. 108 (R.); *Fox v. Tuttle*, 55 Ill. 377 (R. R.).

4—*Dukes v. Rowley*, 24 Ill. 210 (R. R.).

5—*Fitch et al. v. Pinckard et al.*, 4 Scam. 69 (Af.).

6—*McLaughlin v. Thompson*, 55 Ill. 249 (R. R.).

7—*Clark v. Thompson*, 55 Ill. 249 (R. R.); *Botsford v. O'Conner*, 57 Ill. 73 (Af.); and *Fell v. Young*, 63 Ill. 106 (R. R.).

8—*Firebaugh v. Hall*, 63 Ill. 81 (R. R.).

not state all the facts required by the statute to be stated.<sup>9</sup>

An administratrix was removed in response to a petition that averred that she had failed to pay a claim against her decedent's estate which was solvent, but did not ask for a revocation of letters. It was held in a suit upon her bond as administratrix, that the decree of removal could be successfully attacked collaterally.<sup>10</sup>

#### PETITION FOR LETTERS OF ADMINISTRATION

PETITION OF .....in the matter of  
the estate of.....Deceased, for Letters of Administration.  
To the Hon. ....

County Judge of.....County, in the State of Illinois.

The petition of the undersigned.....  
respectfully represents that.....late of the County  
of.....aforesaid, departed this life at.....  
on or about.....day of.....A. D. 19.., leaving no last will  
and testament, as far as your petitioner know or believe.

And this petition further shows that said.....  
died, seized and possessed of real estate described as follows, to-wit:.....  
.....

And also personal property, consisting chiefly of.....  
.....

All of said personal estate being estimated to be worth about.....  
Dollars. That said deceased left h...surviving as h...only heirs at law:

Names	Relationship	Residence
.....	.....	.....
.....	.....	.....
.....	.....	.....

9—Chicago and Northwestern Ry. Co., 133 Ill. 657 (Af.).

10—Munroe v. People for Use, 102 Ill. 406 (R. R.) and Hanifan v. Needles, 108 Ill. 403 (Af.).

If the tax judgment is to recover the amount of a tax levy by a taxing board and is not a tax or an assessment, the validity of which has

been the subject matter of an adjudication, the record will be subject to collateral attack. But if the confirmation judgment under the statute is the support for the treasurer's application for judgment of sale, then the record will not be subject to collateral attack. *Riverside Co. v. Howell*, 113 Ill. 256 (R. R.).



That your petitioner (being.....of said deceased), believing that said estate should be immediately administered, as well for the proper management of said estate as for the prompt collection of the assets, by virtue of.....right under the statute, therefore prays that your Honor will grant Letters of Administration to.....whose Post Office address is.....upon.....taking the oath prescribed in the statute, and giving bond in such sum and with such securities as may be approved by your Honor.

Signature.....  
 State of Illinois, }  
 ..... County } ss. ....being duly  
 .....deposes and says that the facts averred in the  
 above petition are true in substance.  
 Subscribed and.....to before me, this  
 .....day of.....A. D. 19..  
 .....Clerk.

PETITION ADMITTING WILL TO PROBATE

State of Illinois, }  
 ..... County } ss. COUNTY COURT, PROBATE SIDE  
 or  
 PROBATE COURT  
 .....Term, A. D. 19..

To the Honorable.....Judge of said Court:  
 The undersigned petitioner.....respectfully represents to your Honor that the attached instrument of writing purports to be the Last Will and Testament.....of .....deceased.

That said deceased departed this life at.....  
 .....on or about the.....day of.....A. D. 19..  
 and also that.....at the time of h... death,  
 resided at .....in the County of.....and  
 State of Illinois.

That said deceased left h... surviving as h... only heirs at law:

Names	Relationship	Residence
.....	.....	.....
.....	.....	.....
.....	.....	.....

That the names and residences of the Legatees and Devisees, other than the foregoing, under the will of said deceased are as follows:

.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

That all of said persons are of full legal age and sound mind except:

.....

Your petitioner further asks that the said Last Will and Testament be admitted to probate.

State of Illinois, }  
..... County } ss.

being duly sworn, deposes and says the allegations contained in the foregoing Petition are true in substance.

Subscribed and sworn to before me, this.....day of.....  
A. D. 19...

It is Ordered by the Court, That the.....day of.....A. D.  
19..., at .....o'clock.....M., be set for hearing of said Will.

Judge.

#### PETITION FOR LETTERS TESTAMENTARY

PETITION OF.....in the matter  
of the last Will and Testament of.....  
deceased, for Letters Testamentary.

To the Hon. ....

Judge of County Court of....., in the State of Illinois:

The petition of the undersigned.....  
respectfully represents that.....late of the  
County of....., aforesaid, departed this life at.....  
in said County, on or about the.....day of.....A. D. 19...  
leaving a last Will and Testament.....duly signed,  
published and attested, as believed by your Petitioner., and which  
.....presented to your Honor for Probate

And this petitioner further shows that the said.....  
died seized and possessed of Real Estate described as follows:.....  
.....  
and personal property, consisting chiefly of.....

all of said personal estate being estimated to be worth about.....  
..... DOLLARS

That said testa....in.....said last Will nominated and appointed  
.....and that..  
.....willing and ready to accept and undertake the  
office and trust confided to.....

.....  
 .....  
 And your Petitioner.. further pray.. that it may please your Honor  
 to grant.....letters Testamentary of said last Will and  
 Testament upon.....taking the oath prescribed by the  
 Statute and entering into bond in such sum and with such securities as may  
 be approved by your Honor  
 .....

State of Illinois, }  
 ..... County } ss. ....  
 being duly sworn, deposes and says that the facts averred in the above  
 petition are true, in substance.

Sworn to and subscribed before me.

.....  
 .....day of.....A. D. 19... }  
 .....

ADMINISTRATOR'S PETITION TO SELL REAL ESTATE

State of Illinois, }  
 ..... County } ss. .... Court  
 ..... Term, A. D. 19...  
 In the Matter of the Application of }  
 .....  
 Administrator.. of the Estate of }  
 .....  
 Deceased, }  
 vs. }  
 .....  
 Administrator's Petition to Sell  
 Real Estate to Pay Debts.

To the Hon. .... Judge of said Court:

Your Petitioner, ..... of  
 ..... in the County of.....and State of Illinois, Ad-  
 ministrator.. of the estate of.....deceased, late of said  
 County, respectfully represents:

That your petitioner.. w..... on the.....day of.....  
 ....duly appointed by the County Court of said.....County,  
 Administrator.. (1).....of the estate of the  
 said.....deceased, as will appear by ..h....  
 Letters of Administration ready to be produced as this Honorable Court  
 shall direct and that ..he.....now such Administrator..

That an Inventory, Appraisement Bill and Sale Bill of said estate have  
 been made and filed in the office of the Clerk of this Court, and been duly  
 approved by this Court.

That your petitioner.. as such Administrator.. ha.... rendered to said  
 Court a just and true account of the personal estate and debts of said  
 deceased, which has been approved by said Court, a copy of which account

is hereto attached and made a part of this petition for reference and evidence, and marked "Exhibit....."

That the personal estate of said.....deceased, as appears from the aforesaid account and exhibit, amounts to..... Dollars besides doubtful and desperate claims, in the hands of your petitioner.. amounting to ..... Dollars, of which.....will probably collect or receive the sum of..... Dollars.

That the claims allowed against the said estate amount to..... Dollars, as will more particularly appear from said account, marked "Exhibit....."

That the just claims to be presented and allowed will probably amount to the sum of.....Dollars.

That there has come to the hands of your petitioner.. personal estate to the amount of.....Dollars, and that..he..ha....disbursed the same and paid out upon claims against said estate the sum of.....Dollars, as set forth in "Exhibit....."

That your petitioner..ha....applied all the proceeds of said personal estate which have come to.....possession, toward the payment of said debts, as by.....accounts and vouchers on file in the office of the Clerk of this Court will more particularly appear.

That there is a deficiency of personal estate to pay the just claims against the estate of said deceased, amounting as near as can be ascertained to the sum of.....Dollars.

That your petitioner further represents that the said.....died intestate, seized in fee.....of certain real estate in the said County of.....described as follows: .....

If a part of the real estate can not be sold without prejudices to the parties interested.....(set out the facts in full).

Your petitioner further represents that the deceased left him surviving .....(give their names and place of residence—state whether they are adults or minors—if minors state their ages and name of guardian, if any).

Your petitioner therefore prays that the court will decree a sale of said premises or so much as may be necessary to pay the debts of the said intestate; that a guardian *ad litem* may be appointed for the minors and for such other and further relief as to this honorable court shall seem meet.

Your petitioner prays that a writ of summons may issue to the sheriff of.....County, Illinois, for.....and to the Sheriff of.....County, for.....commanding him to summon the said defendants above mentioned to be and appear before the

County Court of.....County and State of Illinois, on the first day of.....Term to be held at the.....in the County aforesaid, on the.....day of....., 19...

Signed A. B., Adm'tor, etc.

County Court

.....Term, A. D. 19...

State of ..... }  
County of ..... }

..... }  
of .....Deceased. }  
vs. }  
..... }  
..... }

Order to sell Real Estate to Pay Debts.

On this day come.. said petitioner.. by.....solicitor,..... and move.. the Court that said defendants.....

.....  
be severally called to appear and make answer to the petition herein, and that in default thereof, their several defaults be entered herein, and said petition be taken as confessed by them and each of them; and it appearing to the Court that a summons was duly issued in this cause against all of said defendants, returnable to the.....term, A. D. 19..., of this Court, and that each and all of said defendants.....

.....  
were duly and personally served with such summons herein more than ten days prior to the first day of said.....Term, and have not, nor has any of them, appeared or made answer herein; and it further appearing, from the return of the summons issued herein to the County of....., that the said defendants.....

.....  
cannot be found; and it further appearing to the Court, from the affidavit.. on file, that the said defendant.....

.....  
not.....resident.. of the State of.....and that due notice of the pendency of this suit has been given by publication for at least four successive weeks, in accordance with the provisions of the statute, by notice in the secular newspaper printed and published in the ....., in said County of.....and specially authorized by law to publish legal notices stating the filing of the petition, the pendency of this suit, the names of the parties thereto, the title of the Court, the time and place of the return of the summons issued herein, and a description of the premises described in the petition, the first insertion having been made on the.....day of....., A. D. 19...; more than thirty days before the first day of the present term of this Court, and

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the last publication on the.....day of.....A. D. 19...; and it further appearing that within ten days of the first publication of such notice, the Clerk of this Court sent a copy thereof, by mail, postage paid, addressed to each of said non-resident defendants, .....

.....  
it is ordered and decreed by the Court, that each and all of said defendants .....

.....  
come into court here and plead, answer or demur to the said petition, instant; and said defendants being now severally three times solemnly called so to come, and plead, answer or demur herein, come not, but each and all make default in that behalf; and thereupon it is ordered, adjudged and decreed by the Court, that as to them and each of them, the said petition be taken as confessed; and it further appearing to the Court that the Defendant., .....

.....  
w.... duly and personally served with summons in this cause by the sheriff of.....County more than ten days prior to the first day of the present term of this Court; that they are minors and have.....Guardian \* .....

And afterwards the said.....as such guardian.....comes and files his answer herein, neither admitting nor denying the allegations in said petition contained, but reserving the rights of said minor.. by requiring strict proof.

And this cause now coming on to be further heard upon the petition filed herein, taken as confessed by said adult defendants.....

.....  
the answer of said guardian.....

.....  
aforesaid, and the records of this Court the exhibits and proofs and the testimony of witnesses taken, sworn and examined in open Court and it satisfactorily appearing to the Court from the evidence adduced that all the allegations in said petition are true; that the said.....departed this life on or about the.....day of.....19..., .....,testate, leaving the defendant.....his widow and the defendant.....

.....  
his child.... and only heirs-at-law; .....

.....  
.....that the petitioner.. herein w.... duly appointed.....of the.....of said.....deceased, and that Letters .....were duly granted to ..h.... by this Court, bearing date on the.....

---

\* If the minors have no guardian then insert here, "it is ordered that .....be and he is hereby appointed guardian ad litem for said infant defendants."

day of.....A. D. 19..., and the Court having ascertained upon due examination that said petitioner., ..... as aforesaid, h... made a just and true account of the condition of the estate of said deceased to this Court, and that the personal estate of said deceased is not sufficient to pay the just claims against the estate of the said..... deceased; and the Court having found the amount of the deficiency aforesaid to be the sum of.....Dollars, besides interest and costs; and it further appearing to the Court that the said..... died having claim or title to the following described real estate, situate in the County of.....and State of Illinois, to wit: .....

..... and the Court having ascertained that it will be necessary to sell..... of the said real estate to pay the deficiency aforesaid, with the expenses of administration now due and to accrue. And the said.....having this day filed herein and submitted to this Court the further and additional bond provided by statute to be given on the application of executors and administrators for the sale of real estate, which said bond being in due form and properly executed, has been approved with the sureties thereof by this Court. It is therefore ordered, adjudged, and decreed that the said petitioner.. proceed, according to law, to advertise and make sale of the real estate above described, or so much thereof as may be necessary to pay the debts now due from said estate, and the cost of administration now due and to accrue. And it is ordered and decreed by the Court, that said sale shall be made on the following terms, viz.:

..... which terms shall be distinctly set forth in all the advertisements of said sale.

It is further ordered, that upon such a sale being made, the said..... make and execute to the purchaser or purchasers of said real estate good and sufficient deed or deeds to convey the interest of said deceased therein at the time of h... decease, and that said..... report.. h... action in the premises to this Court for confirmation before delivering any deed or deeds of said premises. And it is further ordered, that this cause stand continued for said report.

## CHAPTER VI

### COSTS

A fee bill can only be issued by the clerk against the party himself at whose instance the costs were made; the clerk can issue a fee bill against the plaintiff for the costs made by him;<sup>2</sup> he can issue a fee bill against the defendant for costs made by him.

But the only way to collect all the costs of plaintiff and defendant against the plaintiff under a judgment is by an execution issued against the plaintiff in response to a *præcipe* filed by the attorney for the defendant.<sup>3</sup>

A motion in arrest of judgment was sustained and judgment rendered in favor of the defendant for costs. Held error. Court observes:

"Our statute concerning costs, does not embrace the case of an arrest of judgment. In such case, by the rule of the common law, costs are not recoverable by either party, but each must pay his own costs."<sup>4</sup> \* \* \*

### FEEs AND SALARIES

Costs are fixed by statute and more can not be recovered than is therein expressed. Statute must be strictly construed.<sup>5</sup> \* \* \*

1—*Neal v. Blanchard et al.*, 32 Ill. 503 (Af.).

2—*Eads v. Couse*, 35 Ill. 534 (Af.).

3—*Wickliff v. Robinson et al.*, 18 Ill. 145.

Without provision of statute, costs cannot be adjudged in Special Assessment Proceedings. *Dobler v.*

*Warren, Village of*, 174 Ill. 92 (R. R.). Or in a special tax proceeding. *People ex rel. Appellee v. Lawson et al.*, 285 Ill. 382 (R. R.).

4—*Smith v. Curry et al.*, 16 Ill. 147 (R.).

5—*Smith, Exr. v. McLaughlin*, 77 Ill. 596 (R. R.).



Appellee had an appeal from a justice of the peace placed on the docket, paid the docket fee, and on his motion the court dismissed the case. Held error. The proper practice would have been to take a rule (to be served on the appellant) to refund the docket fee and, if he failed to do so, then the appeal should be dismissed.<sup>6</sup>

Where appellant neglected to refund the costs advanced in response to the rule entered. Held appeal properly dismissed.<sup>7</sup> \* \* \*

"On motion of the appellee, by his attorney, the said appellant is hereby ruled to pay to said appellee \$8.50 appeal costs, within five days from this date, or in default thereof, suit to be dismissed out of this court." This was held no error.<sup>8</sup>

Clerk has a right to demand fees when services are rendered or in advance.<sup>9</sup> \* \* \*

#### IMPOSITION OF COSTS

Statutes that impose costs must be construed strictly, as they create liability that did not exist at common law.<sup>10</sup>

6—*Edwards v. Duling*, 36 Ill. 351 (R. R.).

7—*Garrity v. Bash*, 84 Ill. 73 (Af.).

8—*Merserve v. Delaney*, 112 Ill. 353 (Af.).

9—*People v. Rockwell*, 2 Scam. 3

(Motion denied); *Morgan v. Griffin*, 1 Gil. 565 (R.); *People ex rel. v. Harlow, Clerk*, 29 Ill. 43 (Mandamus refused).

10—*Gehrke v. Idem et al.*, 190 Ill. 166 (R. R.).

## CHAPTER VII

### ELECTION CONTESTS

An election contest is a statutory proceeding not law or equity. The rules of chancery practice are followed.

#### NATURE OF AN ELECTION CONTEST

Here the court said: "As the bill of exceptions does not purport to contain all the evidence in the case, it is objected by appellee that there should be no review by this court of the finding of the court below upon the facts, but that it should be held correct, the presumption being that there was sufficient evidence to sustain the finding, as has been repeatedly ruled by the court."

"We are of the opinion that this proceeding, under the statute regulating it, is in the nature of a chancery proceeding, and that the rule in chancery practice should be applied here, that to uphold the decree it must appear from the record that it is supported by the proofs."<sup>1</sup>

A decree was affirmed in favor of the contestant on a petition filed in the circuit court to contest the election of a trustee of a village.

Here, on motion, the cause was transferred to the law docket. A plea in abatement was filed and a judgment upon a general demurrer to that plea was sustained and the appellant, electing to stand by the plea, a judgment was rendered in accordance with the prayer of the petition. The defendant appealed. The court says: "The

<sup>1</sup>—*Kingery v. Berry*, 94 Ill. 515  
(B. R.).

court did not err in transferring the cause from the chancery to the common law docket. This is a purely statutory proceeding and is not regarded as a cause at law or in equity.<sup>2</sup>

Reversed against the petitioner. A petition sworn to is a condition precedent to the contesting of the right of an opponent to hold an elective office.<sup>3</sup>

As an elector, appellant filed a petition in the circuit court to contest the election of certain judges. *Petition dismissed for want of jurisdiction.* In holding that an election contest is not a proceeding in law or equity, the court observes: "There are many statutory proceedings which involve rights, but which are not within the terms of the constitution because they are not causes at law or equity. This proceeding has not been regarded under the common law or equity practice, as a cause at law or equity, and is not of the same nature as such a cause."<sup>4</sup>

In case of a contest in regard to the removal of a county seat a court of chancery will interfere. Here the court reviews the evidence in reference to the right of certain persons to vote, whose right to vote was questioned.<sup>5</sup>

A contest was had in Cass County over an election upon the removal of the county seat. The circuit court having pronounced judgment declined to sign a bill of exceptions. The supreme court declined to award a writ of mandamus for the reason that the statute made the decision of the circuit court final. "The proceeding is purely statutory."<sup>6</sup>

A bill in chancery to contest the election of an alder-

2—*Quartier v. Dowiat*, 219 Ill. 326 (Af.).

3—*Daugherty v. Carnine*, Appellate, 261 Ill. 366 (R. R.).

4—*Douglas v. Hutchinson et al.*, 183 Ill. 323 (Af.).

5—*Beardstown et al. v. Virginia et al.*, 76 Ill. 34 (Af.) and 81 Ill. 541.

6—*People v. Smith*, 51 Ill. 177.

man of the 4th ward of East St. Louis was dismissed on the ground of a lack of jurisdiction. It was held under section 5, article 2, Charter Private Laws 1869, p. 887, the contest should be before and by the city council. The court observes: "We do not regard a contest of this character which comes before a city council, as a judicial proceeding, as that term is understood, but rather in the nature of a ministerial act to ascertain who has been elected \* \* \* a duty which the legislature had the undoubted right to confer upon the city council. The finding of such a tribunal is not a judgment, in the sense in which that term is used in the law." <sup>7</sup>

#### CHANCERY PRACTICE FOLLOWED

A petition was filed by one Robert E. Conway to contest the election of trustees to a sanitary district (Ses. Laws, p. 289, 1907). There were several candidates. Certificates of election were issued to five; two of whom were not made party to the petition and only two of the number who failed to receive certificates of election were made party to the petition.

The court held that the petition was defective for want of necessary parties; and as this defect appeared upon the face of the petition, a motion to dismiss was properly sustained.

This was the proper practice because a bill in chancery that shows upon its face a want of proper parties is subject to demurrer or a motion to dismiss; and under the statute at the time the order was entered, it was too late to bring in the parties omitted.<sup>8</sup>

A petition was filed to contest the election of a city court judge. The certificate of the evidence heard was signed by Judge Windes instead of Judge Baldwin who heard the cause, but at the time was sick and unable to

7—Keating v. Stack, 116 Ill. 191 (Af.).

8—Conway, Appellant v. Sexton et al., 243 Ill. 59 (Af.).

act. In the supreme court, a motion was made to strike the certificate of evidence from the record, because the amendment (section 81, Ses. Laws, p. 459, 1911) to the Practice Act, wherein it was provided that, in case of inability of the trial judge to act, another judge might be substituted does not apply to chancery cases. The court observes:

"In our opinion section 81 of the Practice Act cannot be construed as authority for a judge other than the one who heard the case to settle and sign the certificate of evidence in an election contest, and the motion to strike the certificate of evidence is allowed."<sup>9</sup>

The defendant to a petition in an election contest was served by reading the summons and not by leaving a copy with him. It was held that the court had no jurisdiction because the practice in chancery governed.<sup>10</sup>

A judgment against a petitioner was reversed in the supreme court in his favor because he was denied the time allowed for filing a replication, under sections 28 and 29, Chap. 22, R. S. 1874.<sup>11</sup>

9—Brinkman, Appellant v. Bowles et al, 280 Ill. 27 (Af.). (Reversed against the contestants under Sec. 117, of the Election Law of 1885, p. 542, Chap. 46.)

10—Greenwood v. Murphy, 131 Ill. 604 (R. R.). Moore v. Hoisington et al, 31 Ill. 243 (Af.).

11—Rodman v. Wursburg, 183 Ill. 395 (R. R.). Cleland v. Porter, 74 Ill. 76 (Af.).

In the following cases the contestants were successful, but no new or different rules of practice are announced: Zimmerman v. Cowan, 107 Ill. 631 (R. R.); McKinnon v. Makacher, 110 Ill. 305 (Af.); Weinberg v. Noonan et al, 193 Ill. 165 (R. R.). (Petitioner alleged that poles closed at six instead of seven o'clock. Not alleged that thereby any voter was deprived of his right to vote. No fraud shown. Demurrer sustained.)

Brueggemann v. Young, 208 Ill. 181 (R. R.). (City court no jurisdiction to determine the contest of the election of a mayor.)

In the following cases, the contestants were unsuccessful, but no new or different rules of practice are announced:

Blankinship v. Israel, 132 Ill. 514 (R. R.). (Requirement of the statute with reference to endorsing and numbering ballots is directory.)

Lawrence, County of v. Schmaulhausen et al, 123 Ill. 321 (R. R.).

Five citizens filed a petition in the county court to contest the election of Hopkins (Mayor of Chicago). Petition stricken from the files on motion. At a subsequent term contestants filed a bill of review, which was dismissed by the court on the ground that it had no jurisdiction. Contestants appealed. Held under the Act of 1872, R. S. 1874, Chap. 46, Secs. 112-123, a bill of review did not lie, as it was a statutory proceeding in which one form of review was given thereby excluding all other forms.<sup>12</sup>

A petition failed to aver that the petitioner was an elector of the town. Held on demurrer fatal. The pleading must be taken most strongly against the pleader. Reversed against the petitioner.<sup>13</sup>

A petition was dismissed by the county court for lack of jurisdiction to determine a contest of the election of a president of a village under section 97, of the Election Law of 1895. The petition should have been filed in the circuit court.<sup>14</sup>

A court of chancery has no power to restrain a board of canvassers of an election to determine whether a municipality shall change its charter.<sup>15</sup>

For the reason that an election contest is a chancery proceeding "and, except as otherwise provided, is governed by chancery rules," section 81 of the Practice Act which provides that a judge other than the one who heard the case, may sign the bill of exceptions or certificate of evidence, does not apply.<sup>16</sup>

Adams v. McCormick, 216 Ill. 76 (Af.). (Petition did not aver that petitioner was an elector.)

12—Allerton et al. v. Hopkins, 160 Ill. 448 (Af.).

13—Masterson v. Reed, 172 Ill. 37 (R. R.).

14—King v. Jordan, 198 Ill. 457 (Af.).

15—Dickey et al. v. Reed et al., 78 Ill. 261 (R.).

16—Brinkman v. Bowles, 280 Ill. 27 (Af.).

For rules for labeling and counting ballots see Brents, Appellant v. Smith, 250 Ill. 521 (R. R.); Arnold, Appellee v. Keil, 252 Ill. 340 (Af.).

## CHAPTER VIII

### EMINENT DOMAIN—CONSTITUTIONAL PROVISIONS

“Nor shall any man’s property be taken or applied to public use without the consent of his representatives in the general assembly, nor without just compensation being made to him.” Section 11, Article 13, Constitution of 1848.

“Private property shall not be taken or damaged for public use without just compensation. Such compensation, *when not made by the state*, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.” Section 13, Bill of Rights, Article 2, Constitution of 1870.

The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law. Section 5, article 2.

In holding valid under the constitution an assessment of damages by a jury of six men in a proceeding by commissioners of highways to condemn land for a highway, the supreme court thus observes: “This jurisdiction to assess damages in road cases by a jury of six men is uniform, and is conferred on every justice of the peace, and the practice regulating such trials is uniform, and applies to all justices of the peace. The power to enact the law is not prohibited. Nor was trial by jury ever enjoyed at common law, in England or in this state, before the adoption of our present constitution, in condemning property for public use, under the power

of eminent domain. The assessment of damages for property thus taken, before the adoption of the present constitution, was by commissioners and not by a jury.”<sup>1</sup>

#### PETITION

The averments specially required to be in the petition are: The creation and organization of the corporation and its authority to condemn land for public purposes; a description of the property and the purpose for which it is sought to be taken or damaged; that compensation for the property cannot be agreed upon by the parties interested, or that they are incapable of consenting; the names of all parties interested. Section 1, Chap. 47, R. S. 1874.

A petition under the Eminent Domain Act was filed in the County Court of St. Clair County against John B. Bowman, Frank B. Bowman, and Joseph L. Griswold, tenants in common of the land sought to be condemned. It was held not error to overrule a motion for continuance on the ground that one of the tenants was not in court by service of process or appearance. The petitioner had a right to proceed against those who were in court and have their damages determined.

It was also held, that the judge in vacation had the same right to allow amendments to the petition as in term time; that the act of the judge, whether in term time or in vacation, was in contemplation of law the act of the court.

Further, it was held that the averment, “that the petitioner has been unable to acquire the right of way from said owners by voluntary grant or purchase,” was a substantial compliance with the statute.<sup>2</sup>

1—McManus v. McDonough et al., 107 Ill. 95 (Af.) and Drainage Commissioners Town of Niles, Appellees v. Harms, 238 Ill. 414 (Af.).

2—Bowman et al. v. Venice and Carondelet Ry. Co., 102 Ill. 459 (Af.). Also, Lake Shore & Michigan Southern Ry. Co. v. Balto. &



A petitioner, stating the title of a defendant, is estopped from disproving the title alleged; nor has the defendant the burden of proving his title as against the petitioner.<sup>3</sup>

Under an allegation, in the petition, of organization under a special charter and a right to construct a railroad, it was held sufficient, to show the exercise of corporate functions or a *de facto* existence.<sup>4</sup>

No answer is required in response to the petition. The jurisdictional facts must be in the petition. The question whether the petitioner is a corporation and authorized to exercise the right of eminent domain is a question for the court, but may be waived by proceeding to a hearing on the merits without the proof being made.<sup>5</sup>

#### PRACTICE

In eminent domain proceedings, though statutory, the practice is, that which prevails in courts of law. In the

Ohio & Chicago R. R. Co., 149 Ill. 272 (Af.); Reed v. Ohio & Mississippi Ry. Co., 126 Ill. 48 (R. R.); Lieberman v. Chicago Rapid Transit R. R. Co., 141 Ill. 140 (Af.).

See Chicago & Northwestern Ry. Co. v. Chicago, City of, 148 Ill. 141, where it is held that Sec. 2 of the Eminent Domain Act, which requires the averment in the petition that amount of damages cannot be agreed upon between the parties, does not apply, when a city is seeking to condemn land under Art. 9, Chap. 24, R. S. 1874.

See Ward v. Minnesota & Northwestern R. R. Co., 119 Ill. 287 (Af.), where a proper form of petition is given. Lake Shore & Mich. So. Ry. Co., 151 Ill. 359 (R. R.).

3—Peoria, Pekin & Jacksonville R. R. Co. v. Laurie, 63 Ill. 264 (Af.); St. Louis & Southeastern Ry.

Co. v. Teters, 68 Ill. 144 (R. R.); Chicago, City of v. Pick et al., 251 Ill. 594 (Af.).

4—Ward v. Minnesota & Northwestern R. R. Co., 119 Ill. 287 (Af.).

5—Smith, Jr. v. Chicago & Western Indiana R. R. Co., 105 Ill. 511; Gage v. Chicago, City of, 141 Ill. 642 (Af.); Bell, Plaintiff in Error v. Mattoon Water Works and Reservoir Co., 245 Ill. 544 (R. R.); Illinois Western Extension R. R. Co. v. Maynard, 93 Ill. 591 (Af.).

Property belonging to the state not subject to condemnation. See Edwardsville, City of, Appellant v. Madison, County of, 251 Ill. 265 (Af.).

The right to condemn is a preliminary question for the court. See Lieberman v. Chicago Rapid Transit R. R. Co., 141 Ill. 140 (Af.).

absence of a bill of exceptions, presumptions of fact will be in favor of the judgment below.<sup>6</sup>

There is no right of review on a writ of error.<sup>7</sup>

#### OCCUPATION OF STREETS BY RAILROAD CORPORATIONS

Section 24 of an act to provide for a general system of railroad incorporations Nov. 5, 1849 (Ses. Laws, p. 28) provides: "Nothing in this act contained shall authorize the said company to make a location of their track within any city without the consent of the common council of said city." A similar provision was inserted in the Act of 1872 for the incorporation of railroad companies (R. S. 1874, p. 803, section 19, par. 5).

The Act of 1872, providing for the incorporation of cities and villages, contains the following clause:

The city council or board of trustees shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city to any steam or horse railroad company, except upon petition of the owners of the land representing more than one-half of the streets, or so much thereof as is sought to be used for railroad purposes." Paragraph 90, section 1, article 5, chapter 24, R. S. 1874, p. 223.

A bill in chancery was filed attacking an ordinance of the City of Chicago that granted permission to a railroad company to locate its tracks across certain streets. One point made against the validity of the ordinance was, that it did not prescribe the precise line upon which the railroad may be located and constructed. The supreme court in sustaining the ordinance observes:

6—Sanitary District of Chicago v. Chapin, 226 Ill. 499 (Af.) and Sanitary District of Chicago, Appellee v. Munger et al., 264 Ill. 256 (Af.); Chicago Great Western Railroad Co., Appellant v. Ashelford, 268 Ill. 87 (Af.).

7—Sweeney v. Chicago Telephone Co., 212 Ill. 475 (Writ Dis.) and Loomis et al v. Hodson et al, 224 Ill. 147 (Af.).

“The railroad company derives its power to locate its road from the act of the legislature, subject to such restraint as the city council may lawfully exercise under the provisions of the act in relation to cities.” The power to fix the location of the railroad was in the railroad company and not in the city council.”<sup>8</sup>

On the 7th of July, 1883, the Chicago & Evanston R. R. Co. filed a petition to condemn a piece of land belonging to the Chicago and Northwestern Ry. Co.

The points made against the petition and why it should be dismissed were:

First. Because the property sought to be taken was already devoted to a specific public use.

Second. Because the petitioner had no right or power to use the property for the purpose proposed, particularly for the purpose of building an abutment thereon for a bridge.

Third. The petitioner had no power to enter the city nor to operate a steam railroad within the city.

The court held that none of these points were sufficient to warrant the court in dismissing the petition. On the second point the court observed: “The company • • • was organized under a valid charter, and was shown to have done corporate acts under it. That was sufficient to establish a prima facie right to take the property in question for the purposes set forth in the petition, and this prima facie right cannot be successfully assailed in a mere collateral proceeding, as is sought to be done here.” On the third point, the court observed: “The right of appellee to maintain the proceeding is purely statutory, and is wholly independent of any action the city authorities might take on the subject. Appellee is proceeding under its charter and the

<sup>8</sup>—Chicago and Western Indiana  
Railroad Co. et al. v. Dunbar et al.,  
100 Ill. 110 (R. Bill dis.).

Eminent Domain Act, and not under the ordinances of the city.”<sup>9</sup>

The Metropolitan City Railway Co. filed its petition, in which it represented to the court that, by ordinance passed on the 30th of April, 1875, the company was authorized to lay down, operate and maintain railway tracks upon certain streets (naming them) for a period of twenty years from April 30, 1875; that the Chicago West Division Railway Company has, or claims to have some *property right interest* or *privilege* in such streets, which will be destroyed or damaged by laying down, operating and maintaining railway tracks thereon by petitioner, etc.; prayer for condemnation under the eminent domain law.

A trial was had upon the merits and a verdict of one cent returned by a jury. Motion by defendant for a new trial overruled. Motion by petitioner for judgment on the verdict overruled and the petition dismissed. The supreme court reversed the circuit court and directed that judgment be entered upon the verdict.

The court held that the “*property right, interest or privilege*” that the defendant had under contract with the City of Chicago was subject to be condemned under the Eminent Domain Act. And in so holding thus observes:

“The right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subject to the exercise of its power, and may be seized and appropriated to public use when necessity demands it. We are aware of no policy of the law that forbids the taking of such property (the interest a city street railway company may have in a certain street derived by contract with the

<sup>9</sup>—Chicago and Northwestern Ry. Co. v. Chicago and Evanston R. R. Co., 112 Ill. 589 (R. R.).

city) for public use, nor is it forbidden by any limitation imposed by the constitution.”<sup>10</sup>

DAMAGES TO LAND TAKEN—TO LAND NOT TAKEN

Under article 9, chapter 24 R. S., the city undertook to condemn land for a street. There was a claim for damages for the taking of 27 feet off east side of lot seven, and for damages to 27½ feet of land not taken, on which there was a house and other improvements.

The court allowed \$200 for the land taken, and \$275 for the land not taken. The error relied upon to reverse was: That the court in determining the amount of damages to the land not taken, “took into consideration the special benefits accruing to that part of the lot not taken, in consequence of the opening of the street.”

Rule for determining damages stated (quoting from page 50): “Where land is taken for a public improvement, the owner, under our constitution and statute, is entitled to the value of the land actually taken, without regard to any supposed benefits that may accrue by reason of the proposed improvement (*Green v. Chicago, City of*, 97 Ill. 371); but where the owner interposes a claim for damages to that portion of the land *not* taken, in consequence of the improvement, if the land *not* taken has received special benefits—benefits not common

10—*Metropolitan City Ry. Co. v. Chicago West Div. R. R. Co.*, 87 Ill. 317 (R. R.).

See *Chicago & Northwestern Ry. Co. v. Chicago, City of* 140 Ill. 309 (Af.), as to right of a city to extend a street “under or through any railroad track right of way or land of any railroad company.” Also see *Illinois Cent. R. R. Co. v. Chicago, City of*, 156 Ill. 98 (R. R.).

For right of Chicago & Northwestern Ry. Co. to condemn land for

a new passenger terminal in Chicago, see *Chicago & N. W. Ry. Co. v. Chicago Mechanics’ Institute et al.*, 239 Ill. 197 (Af.).

See *Harvey et al. v. Aurora & Geneva Ry. Co.*, 174 Ill. 295 (R. R.) and *Gillette v. Aurora Railways Co.*, 228 Ill. 261 (R. R.), where the respective rights of street railroads and commercial railroads in a street, against abutting property owners, in whom is the fee, are pointed out and considered.

to other property—such benefits may be considered arriving at the amount of damages the owner may have sustained to his property not taken.”<sup>11</sup>

In estimating damages the question is: What is the market value of the land at the date of the filing of the petition. It will be error to exclude evidence relevant to this proposition.<sup>12</sup>

In holding that the value of a water power and mill-site on land proposed to be taken should have been received in evidence, the court observes: “Of course the test as to damages to be paid, is the market value of the land. Witnesses are called, who give their opinion as to what the market value of the land is. They may be asked with great propriety, asked in what the value consists and may state, not only the actual uses of the land, but its capabilities, so far as they add to its market value. If the land has a mine under its surface, the fact may be stated, if the mine adds to its market value, even though such mine has never been worked. So of a water power, even though it has never been utilized.”<sup>13</sup>

For discussion by the court of facts submitted to

11—*Harwood v. Bloomington, City of*, 124 Ill. 46 (Af.). Also, *Village of Hyde Park v. Dunham*, 85 Ill. 569; *Elgin, City of v. Eaton*, 83 Ill. 535; *Page v. Railway Co.*, 70 Ill. 324; *McReynolds v. Railway Co.*, 106 Ill. 152.

12—*Cook v. South Park Commissioners*, 61 Ill. 115 (R. R.) and also *South Park Com'rs v. Dunlevy et al.*, 91 Ill. 49 (R. R.); *Lieberman v. Chicago Rapid Transit R. R. Co.*, 141 Ill. 140 (Af.).

13—*Haslem et al. v. Galena & Southern Wisconsin R. R. Co.*, 64 Ill. 353 (R. R.).

For instructions to juries upon the rules for determining and estimating damages see: *Chicago & Evans-ton R. R. Co. v. Blake*, 116 Ill. 163

(Af.); *Calumet River Ry. Co. v. Moore et al.*, 124 Ill. 329 (Af.); *Prather v. C. S. R. R. Co.*, 221 Ill. 190 (Af.); *Chicago, Bur. & Quincy R. R. Co. v. Kelly*, 221 Ill. 498 (R. R.); *South Park Com'rs v. Ayer et al.*, Appellant, 237 Ill. 211 (R. R.); *Herrin and Southern R. R. Co. v. Nolte et al.*, 243 Ill. 594 (Af.); *West Skokie Drain. Dist. v. Dawson*, Appellant, 243 Ill. 175 (R. R.); *Springfield, City of v. Dolly*, 139 Ill. 34 (Af.); *Chicago & State Line Ry. Co. v. Mines et al.*, 221 Ill. 448 (R. R.); *Reed v. C. & M. Ry. Co.*, 126 Ill. 48 (R. R.).

For discussion by the court of facts submitted to juries, see condemnation cases listed under “Review of Verdicts.”

juries, see condemnation cases listed under "Review of Verdicts."

#### EXECUTION AND INTEREST

Unless the petitioner has taken possession of the land, it will be error to award interest and an execution.<sup>14</sup>

If the petitioner is in possession of the land, or if the litigation, in reference to the right to take, is terminated and a neglect to pay on demand, a claim for interest will be allowed.<sup>15</sup>

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| <p>14—Chicago and Milwaukee Railroad Company v. Bull, 20 Ill. 218 (R. R.) and Cook v. South Park Commissioners, 61 Ill. 115 (R. R.); Illinois and St. Louis Railroad Company v. McClintock, 68 Ill. 296 (Af.); St. Louis and Southeastern Railway Company, 68 Ill. 144 (R.</p> | <p>R.); South Park Commissioners v. Dunlevy et al., 91 Ill. 49 (R. R.); Chicago, City of v. Barbican, 80 Ill. 482 (R. R.).</p> |
| <p>15—Chicago, City of v. Palmer, 93 Ill. 125 (Af.) and Beveridge v. West Chicago Park Commissioners, 100 Ill. 75 (R. R.).</p>   |  |

## CHAPTER IX

### CONCLUSIVE FINDINGS OF FACT

Tribunals whose findings of fact are co-extensive with those of a common law jury.

On review under the Statute of 1837 the courts set aside the verdicts of juries, but they will not disturb the findings of assessors and boards of equalization, commissioners of highways;<sup>2</sup> drainage commissioners

1—*Spencer & Gardner v. People ex rel.*, 68 Ill. 510 (Af.); *People ex rel. v. Lots in Ashley*, 122 Ill. 297 (R. R.); *Spring Valley Coal Co. v. People ex rel.*, 157 Ill. 543 (R. & A.); *New Haven Cloak Co. v. Kochersperger et al.*, 175 Ill. 383 (Af.); *Republic Life Insurance Co. v. Pollak et al.*, 75 Ill. 292 (Af.); *C. B. & Q. Ry. Co. v. Cole et al.*, 75 Ill. 591 (R. R.); *People ex rel. v. Big Muddy Iron Co.*, 89 Ill. 116 (R. R.); *Pacific Hotel Co. v. Lieb et al.*, 83 Ill. 602 (Af.); *Union Trust Co. et al. v. Weber et al.*, 96 Ill. 346 (R. R.); *East St. Louis Connecting Ry. Co. v. People ex rel.*, 119 Ill. 182 (A.); *Adsit v. Lieb et al.*, 76 Ill. 198 (Af.); *Keokuk & Hamilton Bridge Co. v. People ex rel.*, 145 Ill. 596 (R. R.); *Beidler v. Kochersperger*, 171 Ill. 563 (Af.); *Keokuk Bridge Co. v. People ex rel.*, 185 Ill. 276 (Af.); *Burton Stock Car Co. v. Traeger*, 187 Ill. 9 (Af.); *Hulbert v. Baird*, 208 Ill. 209 (Af.); *People ex rel., Defendant in Error v. Hibernian Bank*, 245 Ill. 522 (Af.).

2—*People ex rel. v. Supervisors*, 100 Ill. 640 (R. R.); *Town of Boston v. Supervisors*, 110 Ill. (R. R.); *Board of Supervisors v. People ex rel.*, 118 Ill. 459 (Af. Conover, Plaintiff in error v. Gton et al., 251 Ill. 587 (R. R.).

3—*Moore, Ex'r v. People ex r*, 106 Ill. 376 (Af.); *Gauen et al. v. Drainage Dis.*, 131 Ill. 446 (R. R. Mason and Tazewell Special Drainage Dis. v. Griffin et al., 134 Ill. 3 (Af.); *People ex rel. v. Cooper et al.*, 139 Ill. 461 (Af.).

The provision of Sec. 37, Drainage Act 1879, amended in 1885, in far as it provides that commissioners shall make an assessment of benefits in lieu of a jury, is constitutional. *Stack v. People*, 217 Ill. 220 (Af.).

The rule that the finding of fact of a board of commissioners is conclusive does not apply to jurisdictional facts. A quasi-judicial body cannot conclusively determine the facts upon which its jurisdiction rests. *McDonald et al. v. People ex rel.*, 214 Ill. 83 (Af.).



and city councils; <sup>4</sup> State Board of Health, under Law of 1899, p. 275, <sup>5</sup> unless the findings of fact of these tribunals are unreasonable or so tainted with fraud and oppression to the property owners as to shock the judicial sense of right and justice.

This rule applies specially to commissioners of highways in determining when the necessity exists for county aid in building bridges and the vacation of roads; to drainage commissioners in determining the boundaries of drainage districts; and to city councils when passing upon the necessity of a street improvement, the limit

4—*Crawford et al. v. People ex rel.*, 82 Ill. 558 (Af.); *Fagan et al. v. Chicago, City of*, 84 Ill. 227 (Af.); *Bigelow et al. v. Chicago, City of*, 90 Ill. 49 (Af.); *Springfield, City of v. Green et al.*, 120 Ill. 269 (R. R.); *Waters v. Lake, Town of*, 129 Ill. 23 (Af.); *Louisville and Nashville Ry. Co. v. East St. Louis, City of*, 134 Ill. 656; *C. & B. & Q. R. R. Co. v. Quincy, City of*, 141 Ill. 563 (Af.); *Illinois Central Ry. Co. v. Chicago, City of*, 141 Ill. 536 (Af.); *English v. Danville, Village of*, 150 Ill. 92 (Af.); *Jones v. Lake View, Town of*, 151 Ill. 663 (Af.); *Chicago, City of v. Wilson et al.*, 195 Ill. 19 (Af.); *Haley et al. v. Alton, City of*, 152 Ill. 113 (Af.); *Chicago and Alton Railroad Co. v. Joliet*, 153 Ill. 649 (Af.); *Chicago, City of v. Seben*, 165 Ill. 371 (Af.); *Billings v. Chicago*, 167 Ill. 337 (Af.); *Latham et al. v. Wilmette, Village of*, 168 Ill. 153; *West Chicago Park Com. v. Farber*, 171 Ill. 146 (R. R.); *McChesney v. Chicago, City of*, 171 Ill. 253 (R. R.); *Walker v. Morgan Park, Village of*, 175 Ill. 570 (Af.); *Allen v. Chicago, City of*, 176 Ill. 113; *Walker v. Chicago, City of*, 202 Ill. 331 (Af.); *Clarke v. Chicago, City*

*of* 214 Ill. 318 (Af.); *Shannon v. Hinsdale, Village of*, 180 Ill. 203 (Af.); *Field v. Western Springs, Village of*, 181 Ill. 186 (Af.); *Myer et al. v. Chicago, City of*, 196 Ill. 591 (Af.); *Laugel v. Bushnell, City of*, 197 Ill. 20 (Af.); *Duane v. Chicago, City of*, 198 Ill. 471 (Af.); *Storrs v. Chicago, City of*, 213 Ill. 92 (Af.); *Peru, City of v. Bartels et al.*, 214 Ill. 515 (R. R.); *Guyer v. R. I., City of*, 215 Ill. 144 (Af.). *Bush v. Peoria, City of*, 215 Ill. 515 (Af.); *Ton et al. v. Chicago, City of*, 216 Ill. 331 (Af.); *Lingel v. West Chicago, Park Commissioners*, 222 Ill. 334 (Af.).

*Park, Village of, v. Trah*, 218 Ill. 516 (Af.).

*Sheedy v. Chicago, City of*, 221 Ill. 111 (Af.); *Chicago Union Traction Co. v. Chicago, City of*, 223 Ill. 37 (Af.); *Belleville, City of, v. Pfingsten*, 225 Ill. 293 (R. R.).

5—*People ex rel. Def. in Error v. Apfelbaum*, 251 Ill. 18 (Af.).

See *Owners of Lands v. People ex rel.* 113 Ill. 296, for distinction between "judicial" and "ministerial" functions illustrated by a reference and review of prior authorities.

or extent of an assessment district, the relative amount of benefit between the property owner, and the public, and the imposition of a special tax upon contiguous property.

In *Dunham v. Hyde Park, Village of*, 75 Ill. 371, a bill was filed to enjoin the village from laying out a street. In dismissing the bill, it was held that the propriety and necessity of the act of the city council, was a question solely for it to pass upon.

Again, special commissioners were appointed to assess property specially benefited. In a collateral proceeding the point was made that the commissioners had wilfully and fraudulently failed and refused to assess real estate, knowing the same to be specially benefited. The supreme court in sustaining the act of the commissioners thus observes: "As a matter of necessity, their judgment must control, else there would be no such improvement. If a board of public works, selected, as must be supposed, for their good judgment, integrity, and general capacity, should, under their official oaths declare by their report that certain property is specially benefited by a proposed improvement, can it be that their judgment can be overthrown by the testimony of others no more intelligent, and no more honest than they?" *Elliott v. Chicago City of*, 48 Ill. 293 (Af.).

In *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556, a bill in chancery was filed to enjoin the collection of a tax based on a valuation certified to the county clerk by the State Board of Equalization. The point was made that the state board had no authority to assess for taxation the "capital stock and franchise."

In sustaining the action of the state board the court held that a franchise has value because it grants rights, privileges, and exemptions not enjoyed by individuals generally. That there were three kinds of its property subject to taxation,—the capital stock, the corporate property, and the franchise. It was urged that the rules

adopted by the board were "unjust, illegal and unconstitutional." The court, after examining the rules and finding nothing illegal or unjust in them, concludes: "The taxing power is legislative and political in its nature, and is not under the judicial power of the state; and the court cannot interfere unless the tax is void, because levied without power on the part of the officer executing the revenue law" \* \* \* "The valuation of property is conferred upon, and is solely entrusted by the organic law to another and different class of individuals and officers than those connected with the judicial department of the government."

In sustaining the finding of the city council that supported a confirmation of a special tax the supreme court, in *Chicago & Northwestern Railway Co. v. Elmhurst, Village of*, 165 Ill. 148, observes: "We have held over and over again, that under the statute in pursuance of which the present tax was levied, the determination of the common council is final upon the question of benefits."

The rule is thus firmly established that the court will not substitute its judgment upon questions of fact for the judgment of these semi-judicial bodies, for the reason: "Where the law (p. 206, *Wilcox et al. v. The People ex rel.*, 90 Ill. 186 (R.)) has vested a *quasi* judicial power, even in subordinate administrative officers, the court will only inquire whether the officer has acted within the power, and will not attempt to substitute any other conditions to the exercise of their discretionary power than such as the law has provided."

## CHAPTER X

### MECHANIC LIENS

Since the revision of the Statutes of Illinois of 1874, section 1 of the mechanic liens, which defines its scope and the condition under which it can be enforced, has undergone several modifications.<sup>1</sup>

The facts that must be shown to exist in order to support a decree fastening a lien on behalf of a material man or a contractor upon real estate as last determined and revised by the legislature are to be found in the Session Laws of 1919, p. 640.

#### MEANING OF THE TERM "CONTRACTOR"

The legislature has defined a contractor as one who performs services, as an architect, structural engineer, superintendent, timekeeper, mechanic, laborer or otherwise and also one who furnishes material, fixtures, apparatus, machinery and forms or form work used in the process of construction where cement, concrete or like material is used; this material must be used to "build," "alter," "repair," "ornament," "lower" or "remove" a house, construct "any other building," "a sidewalk

1—Session Laws 1895, p. 225; Session Laws 1903, p. 230; Session Laws 1913, p. 400.

*Aurand v. Martin et al.*, 188 Ill. 117 (Af.), construes sections 1 and 17 of the Act of 1895. Under a contract covering different buildings upon different lots the apportionment of the lien can only be

when the buildings are upon adjoining lots.

Amendment to section 1 of the Mechanic Lien Act, Sess. Laws 1919, p. 640.

Act for the benefit of mechanics, approved Feb. 22, 1833. See reference thereto, 3 Gil., page 262.

on the land," "a sidewalk bordering on the land," "a driveway," "a fence," "an improvement," "any appurtenance thereto," "excavating a lot," "sodding a lot" doing "landscape work" on the lot.

#### MEDIUM THROUGH WHICH LIEN CAN BE OBTAINED

The contract under which the material is furnished or the labor performed must be "express or implied" or "partly express or implied with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement."

#### EXTENT OF THE LIEN

A contractor "shall have a lien upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to two or more buildings, or two or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date the same is due."

#### QUANTITY OF ESTATE UPON WHICH A LIEN MAY REST

"This lien shall extend to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein, and shall be superior to any right of dower of husband or wife in said premises, *provided* the owner of such dower interest had

knowledge of such improvement and did not give written notice of his or her objection to such improvement before the making thereof; nor shall the taking of additional security by the contractor or sub-contractor be a waiver of any right or lien which he may have by virtue of this act, unless made a waiver by express agreement of the parties; and this lien shall attach as the date of the contract."

Amendment to section 1 of the Mechanic Lien Act, Ses. Laws 1919, p. 640.

#### PRACTICE

The chancery practice is followed when petitions are filed to enforce mechanic liens except so far as modified by statute. The verdict of a jury, when taken, is not obligatory but advisory only.<sup>2</sup> The averments and proof must correspond.<sup>3</sup> It was held error to instruct the jury that a sworn answer was equal to two witnesses, as the rule is: "the answer is evidence for the defendant, and can only be overcome by two witnesses, or one witness and strong corroborating circumstances."<sup>4</sup> A defendant to avail of a claim must set it up by cross petition.<sup>5</sup> As there is no redemption from a sale under a decree, ninety days or more must be allowed the defendant in which to pay the money.<sup>6</sup> A decree was entered for \$1,156.60, with a provision "that the property shall be sold within ninety days after the sheriff shall have received a copy of the decree, in the same manner

2—Kimbal et al. v. Cook, 1 Gil. 423 (R. R.). Also following: Garrett v. Stevenson et al., 3 Gil. 261 (decree amended); Sharkey et al. v. Miller, 69 Ill. 560 (Af.).

3—Van Court v. Bushnell et al., 21 Ill. 624 (R. R.), and Bush et al. v. Connelly et al., 33 Ill. 447 (R. et Dis.).

4—Morrison et al. v. Stewart et al., 24 Ill. 24 (R. R.).

5—Sutherland et al. v. Ryerson et al., 24 Ill. 517 (Af.).

6—Link v. Architectural Iron Works, 24 Ill. 551 (R. R.); West et al. v. Fleming, 18 Ill. 248 (Af.).

as sales are made on executions at law." On review the supreme court observes in reversing the decree, "it would not have been unreasonable to have given six months."<sup>7</sup> Where one claimant for a lien files a petition and other claimants are made party or intervene, it will not be error to decree consolidation of the petitions and to allow all the claimants according to their respective equities to participate in the fund derived from a sale without filing cross petitions.<sup>8</sup>

#### COMMON LAW RULE AS TO PRESERVING EVIDENCE

The party, who objects to the findings of fact below, and desires to have the decree reviewed on error or appeal, must preserve the evidence as in common law cases.<sup>9</sup>

#### PETITION

The petition must contain all the statutory requirements. It will be construed strictly, as it is in derogation of the common law. A petition did not aver "at what time the work was performed, nor at what time, by the terms of the original contract, it was to be paid for." It was held fatal on demurrer.<sup>10</sup> "The petition, like a declaration, must contain a statement of the cause of action, and show clearly on its face, a right in the plaintiff to recover. There is a fatal defect in this peti-

7—Claycomb v. Cecil, 27 Ill. 501 (R. R.).

8—Thielman et al. v. Carr et al., 75 Ill. 385 (R. R.).

9—Kelley et al. v. Chapman, 13 Ill. 530 (Af.); also Ross et al. v. Deer et al., 18 Ill. 245; Kidder v. Aboitz, 36 Ill. 478 (Af.); Croakey et al. v. Northwestern Manufacturing Co., 48 Ill. 481 (R. R.); Jen-

nings v. Hinkle et al., 81 Ill. 183 (Af.); Lewis et al. v. Rose, 82 Ill. 574 (Af.).

See King et al. v. Lamon et al., 193 Ill. 537 (Af.), where the court in giving a reason for affirming the decree of the circuit court ignore or overlook this rule.

10—Logan v. Dunlap, 3 Scam. 188 (R.).

tion, in the omission to state the terms of the contract. It does not show when the contract was made, within what time it was to be performed, when payment was to be made, nor any of the essential ingredients of a contract.”<sup>11</sup> Referring to a clause of the statute that required the contract to be performed within three years and the payment to be made within one year of the time of its completion, the court observes: “This provision obviously requires that the time for its performance and the payment of the money shall be determined at the time when the contract is entered into, and not by alterations and changes that may be made in the agreement after it is entered into. And if there be no time fixed and agreed upon in the contract for the performance of the labor or furnishing the materials, within three years from its execution, and for the payment within one year from the completion of the labor or furnishing the materials, a lien would not attach. The lien is given by statute, and is in derogation of the common law, and is opposed to common right, and should be strictly construed.”<sup>12</sup>

The circuit court allowed a lien on certain premises “for the paving of a street in front of said premises, providing and making arrangements to have gas and water mains in the street front, sewer and sewer connections extending inside the side walk line, and for the construction of a side walk six feet in width in front of the premises.”

11—*Muller v. Smith*, 3 Scam. 543 (Af.).

12—*Cook et al. v. Heald et al.*, 21 Ill. 425 (R. R.) and *Cook et al. v. Vreeland*, 21 Ill. 431 (R. R.), and *Cook et al. v. Rofinot et al.*, 21 Ill. 437 (R. R.); *Phillips v. Stoner et al.*, 25 Ill. 77 (R. R.); *Burkhart et al. v. Reisig*, 24 Ill. 529, dismissed; *Reed et al. v. Boyd et al.*, 84 Ill. 66

(Af.); *Freeman v. Binaker, Jr.*, 185 Ill. 172, decree of circuit court dismissing petition affirmed; *Kelley v. Northern Trust Company*, 190 Ill. 401 (Af.); *King et al. v. Lamon et al.*, 193 Ill. 537 (Af.); *Pugh Company v. Wallace et al.*, 198 Ill. 422 (Af.); *Paddock et al. v. Stout et al.*, 121 Ill. 571 (Af.).



Section 1 of the statute of 1903 (p. 230) provided for a lien for building a sidewalk "whether such walk or side walk be on the land or bordering thereon," but did not provide for a lien for any part of the remainder of the work that was done under one entire contract. The lien was defeated because there was no means from the contract itself of determining what portion of the work was expended in constructing the side walk. Following the ruling announced in *Smith v. Kennedy*, 89 Ill. 485, the court observes: "The Mechanic Lien Law is in derogation of the common law and its provisions must be strictly construed, and no one can claim a lien unless it clearly appears the requirements of the law have been complied with."<sup>13</sup>

#### TIME FOR PERFORMANCE OF THE CONTRACT

"In no event shall it be necessary to fix or stipulate in any contract a time for the completion or a time for payment in order to obtain a lien under this act, *provided*, that the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material."<sup>14</sup>

In sustaining the circuit court in dismissing a petition filed to enforce a mechanic lien for services performed by an architect, the supreme court observes:

"No lien can be enforced for the appellee's services under this contract, for the reason that the contract is in writing, and contains no provision as to the time within which the work was to be performed or the money to be paid."<sup>15</sup>

13—*Turnes, Appellant v. Brenckle*, 249 Ill. 394 (Af.); *Cronin et al. v. Tatge, Appellant* 281 Ill. 336, judgments of circuit and appellate courts reversed.

14—Sec. 6, p. 232, Sess. Laws 1903.

15—*Freeman v. Rinaker, Jr.*, 185 Ill. 172 (Appellate Court B.) and *Kelley v. Northern Trust Co.*, 190 Ill. 401 (Af.); *King et al. v. Lamon et al.*, 193 Ill. 537 (Af.).

A proceeding to enforce a mechanic's lien failed because there was a provision that 30 per cent of the amount due on the contract should be paid by notes maturing on or before one year from the time of the completion of the building under section 3, statute of 1887. In sustaining the circuit court, the supreme court observes: "We are of the opinion that in both of these contracts the time of the payment stipulated for a part of the amount was beyond one year from the time of the completion of the respective contracts, and therefore appellants were not entitled to liens for the material and work under the Mechanics' Lien Act in force. \* \* \* The lien given under our law to material-men or mechanics is purely statutory, and can only be enforced in accordance with its strict provisions." <sup>16</sup>

#### NOTICE

The limitation clause of the statute first adopted read: "No creditor shall be allowed to enforce the lien created under the foregoing provisions, as against or to the prejudice of any other *creditor or any incumbrance*, unless suit be instituted to enforce such lien within six months after the last payment for labor or material shall have become due and payable." <sup>17</sup>

Under the statute as thus enacted, the institution of a suit by the claimant for a lien, was the only means afforded by which notice of the claim could be made to third parties. But in 1887 by amendments (sections 4 and 28) the duty was imposed upon the "creditor or contractor" who wished to fasten a lien upon the land to give notice to third parties by filing with the clerk of the circuit court of the county where the property is located, "a just and true statement, or account or de-

16—Provost et al. v. Shirk et al.,  
223 Ill. 468 (Af.).

17—Sec. 28, Chap. 82, R. S. 1874

mand due him after allowing all credits." In the statement must be stated the *time* when the material was furnished, or the labor performed; a correct description of the property to be charged must be given and verified by the affidavit of the claimant.

The lien could not be enforced against "any other creditor, or incumbrance or *purchaser*," unless this statement was filed within "four months after the last payment shall have become due and payable." Suit could then be commenced any time within two years after the time of filing the statement.<sup>18</sup>

In 1913 to meet the holding of the supreme court in *Rittenhouse & Embree Co. v. Brown & Co.*, 254 Ill. 549, the legislature amended section 7 providing that a lien could be enforced for material that was delivered to the land owner "for the purpose of being used in construction or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed forms or form work where concrete, cement or like material is used, in whole or in part."<sup>19</sup>

To meet the holding of the supreme court in *Cronin v. Tatge*, 281 Ill. 336, wherein it was held that the Mechanics' Lien Law did not authorize a lien upon land for work done in paving of a street and the laying of gas and water mains and sewer connections in streets not connected with the particular lot or land sought to be charged, section one of the statute was amended by the legislature in 1919.<sup>20</sup>

For the reason and purpose of this limitation period of "four months after completion" of the contract, within which time "notice" or "bill" must be filed by the contractor, see *McDonald et al. v. Rosengar-*

18—Sections 4 and 28, Sess. Laws 1887, p. 219. "Six" months' time changed to "four."

19—Sess. Laws 1913, pp. 401-2.  
20—Sess. Laws 1919, p. 640.

ten et al., 126 Ill. 127 (Af.); Schmidt et al. v. Anderson et al., Appellants, 253 Ill. 29 (R.); Eisendrath Company v. Gebhardt et al., 222 Ill. 113 (Af.); Campbell v. Jacobson et al., 145 Ill. 389 (Af.); Von Tobel v. Osterlander, 158 Ill. 499 (Af.); Buckley et al. v. Com. Nat. Bank et al., 171 Ill. 284 (Af.).

#### CONFLICTING RIGHTS BETWEEN DIFFERENT LIEN HOLDERS

As against a prior mortgagee the mechanic or material man has a prior lien on the building, and a subsequent lien on the land as valued at the time of making the contract, for labor or material.<sup>21</sup>

The rule is stated as follows by Justice Lawrence: "As between mortgagee and material man, the court should have ascertained at what time the improvements were commenced for which the materials of complainants were furnished, and should have given to the prior mortgagees a paramount lien on the property as it stood when such improvements were commenced, and to the complainants (material men) a paramount lien on the improvements towards which they furnished materials, and should have directed the master to inquire into the comparative value of the property before and after the improvements were made."<sup>22</sup>

21—Sec. 16, Act of 1903, page 237. (See also Sec. 17, Chap. 82, R. S. 1874.)

22—Croskey et al. v. Northwestern Mfg. Co., 48 Ill. 481 (decree modified). Also, Raymond et al. v. Ewing et al., 26 Ill. 329 (R. R.); North Presbyterian Church of Chicago v. Jevens et al., 32 Ill. 214 R. R.; Howett v. Selby et al., 54 Ill. 151 (Af.); Clark et al. v. Moore et al., 64 Ill. 273 (Af.); Reed et al. v. Boyd et al., 84 Ill. 66 (Af.);

Bradley v. Simpson et al., 93 Ill. 93 (Af.); Paddock et al. v. Stout et al., 121 Ill. 571 (Af.).

See Orr & Lockett Co. v. Needham Company, 169 Ill. 100 (Af.). Lien defeated because the verification to the statement of account was defective. See McDonald et al. v. Rosengarten et al., 134 Ill. 126 (Af.), for a defective verification and the purpose and object of its requirement.

## FORM OF NOTICE

The most important question to mechanics and material men is the form of the notice to be filed in the office of the recorder of deeds of the county, where the land is located. In *Moore v. Parish et al.*, 163 Ill. 93 (R. R.), a form of notice is given, that the circuit court condemned and the supreme court held good.

The following "Statement of Claim for Lien" prepared by the Illinois Printing Co., Danville, Illinois, follows all the requisitions of the law and can be safely relied upon for general use.

A claim filed within four months of the completion of the last building is not good as to buildings that were completed before the commencement of this four months period.

## STATEMENT OF CLAIM FOR LIEN

KNOW ALL MEN BY THESE PRESENTS, That.....  
 of.....in the county of.....  
 and State of.....hereinafter styled the claimant..  
 claim.. a mechanic's lien for (1).....in and about the  
 improvement of the following described real estate lying and being in the  
 County of.....and State of Illinois, viz:  
 .....  
 .....  
 Which said real estate at the time of making of the contract hereinafter  
 mentioned was, and now is owned by.....  
 .....  
 .....  
 That on the.....day of.....A. D. 19....claimant...  
 and said.....entered into a contract, which was (2)....  
 in writing, wherein it was provided that claimant....should (3).....  
 .....  
 .....  
 on said above described real estate, and it was further provided, that

- (1) Insert "materials furnished" or "work done" or both as case may be.
- (2) Insert "not" if contract was oral.
- (3) Here make brief statement of contract as to what was to be done or furnished.

S. P.—9

claimant...should complete the said (4).....on the.....  
 day of.....A. D. 19....and that said.....  
 should pay claimant....therefor the sum of.....Dollars  
 in manner following, viz: (5).....

.....  
 And that claimant...did complete said contract on the.....day of  
 .....A. D. 19....And that during the time between the  
 making and completion of said contract, and at the request of said  
 .....claimant... (6).....  
 .....  
 on said premises, which were of the value of.....  
 .....Dollars, a just, true and detailed  
 statement whereof, and the dates whereon they were respectively furnished  
 and done is as follows:

That all of said above named (7).....  
 .....  
 in and about the (8).....of the building...on said  
 above described premises, and that the first of said (9).....  
 was so furnished on the.....day of.....  
 A. D. 19...and the last of said.....  
 was so furnished on the.....day of.....  
 A. D. 19...

That there is now justly due and owing to claimant...from said.....  
 .....for said (10).....  
 after allowing to...h...all just credits, deductions and set offs, the sum of  
 .....Dollars and.....cents,  
 all of which is still due and unpaid, and for which said last mentioned sum  
 said claimant...claim...a lien upon said above described premises and the  
 appurtenances thereto.

State of.....}  
 County of.....} ss.

.....  
 being duly sworn on h.....oath deposes and says that...he is the (11)

- (4) Insert "repairs, improvements or building" as case may be.
- (5) Insert terms of payment.
- (6) Insert "did work," or "furnished materials" or both as case may be.
- (7) Insert "materials were furnished" or "work was done" or both as case may be.
- (8) Insert "repair," "improvement" or "erection" as case may be.
- (9) Insert "materials" or "work" or both as case may be.
- (10) Insert "materials" or "work" or both as case may be.
- (11) Insert "one of the," "agent of the" or "employee of the" as case may be.

.....claimant...in the foregoing claim of  
 lien mentioned (12).....

And affiant further says that all of the matters and things in said fore-  
 going claim of lien alleged are true as therein set forth, and that the (13)  
 .....in said statement mentioned  
 (14) .....said.....  
 at the times and prices in said statement stated; and that there is now due  
 and unpaid to said claimant...on account of said.....  
 the said sum of.....Dollars and.....cents.

State of..... }  
 County of..... } ss.

Subscribed and sworn to before me this.....day of  
 .....A. D. 19....  
 (15).....

- 
- (12) If any one except claimant makes oath insert "and makes this oath  
 on behalf of said claimant...."  
 (13) Insert "work" or "materials" or both as case may be.  
 (14) Insert "furnished to," "done for" or "furnished to and done for."  
 (15) This claim for lien may be filed at any time after the contract is made,  
 not exceeding four months after the completion of the contract or  
 furnishing extra work or material.

## CHAPTER XI

### PARTITION

The failure of practitioners at the bar to recognize, at all times, the boundary line between a proceeding in law and one in equity to partition land, together with the indulgence of courts towards this laxity, renders it impossible to separate all the cases that apply solely to statutory partition from those in which the practice under both heads has been united.

The question, however, is to what extent must a court of law be governed by the principles of equity and to what extent must a court of equity be governed by the statute. Except so far as the legislature has, from time to time, relieved the uncertainty, the line of demarkation is often shadowy. All that properly belongs in a separate chapter in equity is outside the scope of what is here treated.

In 1827 a statute was passed providing for the partition of lands. It was entitled "An Act for the speedy assignment of dower, and partition of real estate." Section 2 of the first act (1819) is substantially re-enacted in section 16 of the Act of 1827. In the revision of the Statutes of 1845, the provisions, in reference to partition and dower, are in separate chapters. In the Revised Statutes of 1874 (chap. 106, p. 749) the same division is continued.

The difference between partition, under the statute and partition in chancery is, in *Louvalle et ux. v. Menard et al.*, 1 Gil. 39, stated as follows:



"In this proceeding, the defendants are not, as in suits in equity, required to make discovery, or even to answer the petition under oath; and the testimony is not necessarily taken by depositions, but may be introduced *viva voce*. The court is to act on the legal estates, and not on the equities of the parties. Its only duty is to ascertain their respective legal interests in the premises, and direct a division among them accordingly. All questions concerning the rents and profits, and repairs and improvements, are to be determined by some other appropriate remedy."

In the following particulars, the statutory proceeding differs from the chancery: The petition must be verified by affidavit;<sup>1</sup> in the construction of the pleadings, the rules of law rather than the rules of equity govern;<sup>2</sup> dower and homestead cannot be sold, under the statute, without the consent in writing of the person to be affected thereby;<sup>3</sup> final judgment vests the legal title to the portion assigned in the respective owners, without the exchange of deeds;<sup>4</sup> jurisdiction of minors can be obtained by service on their guardian, named in the petition;<sup>5</sup> the commissioners appointed to make the sale of the land should file with their report of the sale a copy of the advertisement giving notice of the sale.<sup>6</sup>

1—Labadie et al. v. Hewitt, 85 Ill. 341 (Af.).

2—Greenup v. Sewell, 18 Ill. 53 (R. R.); Gregory v. Gover et al., 19 Ill. 608 (Af.); Hopkins et al. v. Medley et al., 97 Ill. 402 (R. R.); Speck et al. v. Pullman Car Co. et al., 121 Ill. 33 (Af.); Hopkins et al. v. Medley, 99 Ill. 509; Peek et al. Appellees v. Woman's Home Miss. Society, 293 Ill. 337 (R. R.).

3—Merritt et al. v. Merritt, 97 Ill. 243 (R. R.); Wilson v. Ill. Trust and Savings Bank, 166 Ill. 9

(Af.); Cutler v. Cutler, 188 Ill. 285 (Af.); Marshall v. Marshall, 252 Ill. 568 (R. R.). See Sec. 32, Ch. 106, R. S. Partition.

4—Street v. McConnell, 16 Ill. 125; Hassett v. Ridgely, 49 Ill. 197 (Af.).

5—Nichols v. Mitchell, 70 Ill. 258 (Af.). See Sec. 10, Ch. 106, R. S. 1874, which says that defendants shall be served in the same manner as defendants in chancery.

6—Hess et al. v. Voss et al., 52 Ill. 472 (Af.).

## PARTITION STATUTE

Section 1. "When land, tenements or hereditaments are held in joint tenancy, tenancy in common or coparcenary, whether such right or title is derived by purchase, devise or descent, or whether any or all of the claimants are minors or of full age, any one or more of the persons interested therein may compel a partition thereof by bill in chancery as heretofore, or by petition in the circuit court of the proper county."

In *Barr v. Barr*, 273 Ill. 621 (R. R.), one joint tenant filed a bill for partition against another joint tenant. The bill was dismissed. It was contended that section 1 of the Partition Act was in conflict with section 5 of the Conveyance Act. The court in reversing the lower court says: "The right to partition, conceding that it destroys the right of survivorship in an estate in joint tenancy, is not altogether inconsistent with the right to create an estate in joint tenancy, as insisted by appellee. Joint tenants could change an estate in joint tenancy to a tenancy in common or to one in severalty before either of said sections were passed,—i. e., at common law. Therefore it is not a sufficient objection to a partition of such an estate that it destroys the right of survivorship."

There is nothing to show that this was a petition under the statute, though the statute is applied.

Examine *Mechling Pl. in Error v. Meyers et al.*, 284-484 (Af.) where section 1 is construed and it is held that partition may be denied.

## PARTIES IN PARTITION

In *Smith v. Higgins et al.*, 152 Ill. 159, it was held that before a distribution in a partition case can be made judgment creditors of parties to the suit should be brought before the court. This was a chancery case.

In *Loomis v. Riley*, 24 Ill. 307 (R. R.). From the

opinion of the court it does not appear whether this was a chancery proceeding or a proceeding under the statute. It was urged that a mortgagee was not a necessary party to a partition suit.

The court says: "Our statute regulating partitions requires that the petition shall particularly describe the premises, and set forth and make exhibits of the rights and titles of all parties, interested therein, so far as known, etc.

"The 3rd section requires all persons having such an interest to be made parties to the proceeding.

"The statute is certainly comprehensive enough to embrace a mortgagee within the rights and interest required to be made parties."

In *Mansfield v. Wallace*, 217 Ill. 622, persons holding mortgages were omitted from the bill. On bill filed to set aside the sale made under a decree rendered, the court says: Section 6 says that "every person having any interest who is not a petitioner shall be made a defendant." Section 15 says that "the court shall ascertain and declare the rights of the parties." In this case the master's sale was set aside.

#### VESTING TITLE UNDER STATUTE OF 1861

The fact that a court of equity could not vest title in the parties, by decree, led to the enacting of a statute<sup>8</sup> in 1861 giving a court of equity power "to vest titles by their decrees in the parties to whom partition of the premises are assigned" and to determine conflicting titles, remove clouds and apportion incumbrances among the parties. In 1874 a like power was given to courts when acting under the statute,<sup>9</sup> notwithstanding the supreme court had held that a judgment on the law side

<sup>8</sup>—Session Laws 1861, page 181,  
Chap. 106, Sec. 39 R. S. 1874.

<sup>9</sup>—Revised statutes of 1874, page  
753.

of the court declaring the rights and interests of the parties, plaintiff and defendant in the petition, would vest the title without the intervention of deeds of conveyance.<sup>10</sup>

Section 39 Ch. 106 Partition.<sup>11</sup> For the reason that, as said in *Wadams v. Gay*, 73 Ill. 413, "a partition of an estate in a court of chancery (quoted from page 429) is not finally completed until mutual conveyances are executed of the allotments made to the several parties," the statute of 1861, giving a court of equity power to "vest titles by their decrees in the parties to whom partition of the premises are assigned," was enacted.

#### DIRECT AND COLLATERAL ATTACK

When the same result will follow, on review, the distinction between proceedings in chancery and under the statute will be disregarded.<sup>11a</sup>

When a judgment or decree in partition is assailed collaterally, it will be considered, a proceeding under the

10—*Street v. McConnell*, 16 Ill. 125 (R. R.); *Hassett v. Ridgely*, 49 Ill. 195 (Af.).

11—*Gage v. Lightburn et al.*, 93 Ill. 248 (Af.); *Gage et al. v. Reid et al.*, 104 Ill. 509 (R. R.); *Gage v. Bissell et al.*, 119 Ill. 298 (Af.); *Mott et al. v. Danville Seminary et al.*, 129 Ill. 403 (R. R.); *Danville Seminary v. Mott*, 136 Ill. 289 (Af.); *Trainor v. Greenough*, 145 Ill. 543 (Af.); *Marshall v. Marshall*, 252 Ill. 568 (R. R.).

The jurisdiction of equity to decree partition is in no way contingent, on the parties being unable to agree as to a division of the land. *Trainor v. Greenough*, 145 Ill. 543 (Af.).

Though not approved, it is not error to prosecute to decree a parti-

tion of land, before the estate of the ancestor is settled. *Labadie et al. v. Hewitt*, 85 Ill. 341 (Af.); *Sutton v. Read*, 176 Ill. 69 (Af.); *Wachter v. Doerr*, 210 Ill. 242 (R. R.). Reversed because of an erroneous allowance of an attorney or solicitor's fee, and the absence of necessary parties. *Hall v. Gabbert*, 213 Ill. 208 (Af.).

Bill in equity to impeach a decree for fraud. On collateral attack the presumption will be indulged, until rebutted, that those named as parties are all known to the petitioner. *Thornton et al. v. Hustis et al.*, 91 Ill. 199 (R. R. et al.).

11a—*Kester v. Stark et al.*, 19 Ill. 328 (R. R.); *Davis v. Hall et al.*, 92 Ill. 85 (R. & Af.).

statute or in chancery, as will best support the jurisdiction of the lower court.<sup>12</sup>

## REPORT OF SALE

Partition sale may be reported in vacation, and, if no exceptions are filed within 20 days, the judge of the court can approve the sale in vacation. Sections 29 and 30 as finally amended in 1901, p. 261.

In a collateral proceeding (ejectment) it is held that a guardian's sale that has not been confirmed by decree of court confers no title upon the purchaser.<sup>13</sup> A sale made by a master in chancery though not reported and confirmed, is not void when attacked (ejectment) collaterally.<sup>14</sup>

Tibbs et al. v. Allen, 29 Ill. 535 (R. R.), was reversed because the report of sale did not show what notice of the sale had been given. In Ayers v. Baumgarten, 15 Ill. 444, a guardian's report of sale was confirmed as against objection that the time and place of the sale were not generally known and that the property sold for less than it was worth.

In Hess et al. v. Voss et al., 52 Ill. 472, the court intimates that the same notice is not required when the partition is in equity, as when it is in law. The subject is treated as follows:

"It is urged that the court erred in approving the sale made by the master, for want of proof of proper notice of the sale. In this case the master reported that he had given the required notice, and furnished a copy

12—Nichols v. Mitchell, 70 Ill. 258 (Af.).

13—Young et al. v. Keogh, 11 Ill. 642 (R. R.); Rawlings v. Bailey et al., 15 Ill. 178 (R. R.); Chapin v. Curtemius et al., 15 Ill. 427 (Af.); Young et al. v. Dowling, 15 Ill. 481

(R.); Musgrave et al. v. Conover, 85 Ill. 374 (R. R.); Davies v. Gibbs et al., 174 Ill. 272 (R.). Bill in equity master's sale.

14—Miller et al. v. McManus et al., 104 Ill. 421 (Af.).

with his report, which appears to conform to the decree. In *Tibbs v. Allen*, 29 Ill. 535, it was said that the commissioners should have filed a copy of the notice, with an affidavit that it was posted, or if printed, a copy, with a certificate of the purchaser. That case, it will be remembered, was a *proceeding under the statute*, and the decree was executed by the commissioners appointed by the court, while in this case the proceeding was *in chancery*, and the decree was executed by the master, one of *the officers of the court*, and no reason is perceived why a different rule should govern in this, than ordinary cases in chancery. A decree would not ordinarily be reversed because the record did not show the notice, with an affidavit or publisher's certificate. We do not think that this was error requiring a reversal."

Necessary that sale be reported and approved, in order to vest title in the purchaser.

Sale under decree is not complete until it has been confirmed by the chancellor. Till then the sale and purchase is left *in fieri*.<sup>15</sup>

#### PARTITION SUBJECT TO UNEXPIRED LIFE ESTATE

A petition under the statute by one remainder man against a co-remainder man for a sale of the whole premises subject to the unexpired life estate.

The court against the objection of the owner of the life estate decreed a partition. The commissioners reported that partition could not be made. A decree of sale was made. With reference to this decree the supreme court observes: "This order was a natural and legal sequence of the decision of this court. The owner of the life estate cannot be injured by a sale, nor can

15—*Hart v. Burch*, 130 Ill. 426;  
*Davies, Defendant v. Gibbs et al.*,  
174 Ill. 272 (R. R.).

the tenants in common. Either of them may become the purchaser and so may the tenant for life."<sup>16</sup>

In *Drake v. Merkle et al.*, 153 Ill. 318 (R. R.), the question presented was whether remaindermen in fee, pending an unexpired life estate, were entitled to a decree of partition. Here in the opinion are commingled the equity and statutory powers of the court. First the court says that "a bill in chancery" is "brought" "for partition." Next it is said "the question," "was carefully considered by the court in *Scoville v. Hilliard*, 48 Ill. 453, and it was there held that under our *statute* such suit for partition may be maintained. "The *Hartmann Case*, 59 Ill. 103, is differentiated from the one then under discussion, by saying that partition was there denied because the rights and interests of minors were involved and "a superintendence over the estates of infants constitutes a branch of the general jurisdiction of courts of chancery."

In referring to *Jackson v. Jackson*, 144 Ill. 274, it is said it "was a bill brought to review a decree in partition," but "the right of the tenants in common of the reversion to a partition, as among themselves, during the pendency of the life estate, was not called in question."

As a warrant for holding that "remaindermen, pending a life estate, are entitled to a decree of partition." *Hill v. Reno*, 112 Ill. 154, is cited, where in "it was held that where a case is fairly brought within the law authorizing a partition, the right of partition is imperative, and absolutely binding upon courts of equity, and that they are not clothed with such discretion that, under a given state of facts, they may grant relief or refuse it and yet commit no error."

<sup>16</sup>—*Scoville et al. v. Hilliard et al.*, 48 Ill. 453 R. R. This case appears again in 52 Ill. 449.

*Cummins v. Drake*, 265 Ill. 111

(R. R.). Partition: Life estate pending. *Deadman et al. v. Yantis et al.*, 230 Ill. 243 (Af.).

In conclusion, it is said that the court erred in holding that the complainant was not "entitled to partition,—until after the termination of the life estate of her father." And "if the complainants father consents thereto in the manner provided by the statute, his life estate and his estate of homestead may be sold, and its equivalent in cash paid to him, but if he does not so consent the sale will have to be made subject to his life estate, his estate of homestead, if it be found that he has such an estate, being first set off to him as provided by statute."

There are, however, exceptions to the rule that a partition will be decreed pending an unexpired life estate.

For instances in which a court of equity has refused to award a decree of partition between tenants in common, in consequence of a contract entered into by the parties with reference to the use of the land sought to be divided prior to the filing of the bill, see *Martin et al. v. Martin*, 170 Ill. 639; and *Ingraham et al. v. Mariner*, 194 Ill. 269.

For instances where a court of equity has refused to award a partition to devisees pending an unexpired life estate in one of the devisees see *Rudell v. Wren et al.*, 208 Ill. 508; and *Dee v. Dee et al.*, 212 Ill. 338. In these last two cases the main reason assigned for refusing a decree of partition was that, by the terms of the respective wills, it would be uncertain, until after the expiration of the life estate, just what parties would have a right to claim a partition and division of the land.

SETTING ASIDE SALE MADE AFTER THE REPORT OF THE  
COMMISSIONERS HAS BEEN FILED

The rule in reference to setting aside sales made under decree of partition is thus stated in *Ross v. Mead et al.*, 5 Gil. 171. "It is only upon the ground of fraud, or that someone may have been prejudiced by a sale of real estate *en masse*, that the sale will be set aside in equity,



because the property was not sold in separate parcels,—and as there is no complaint or pretence of anything of the kind in this case, the circuit court properly refuse to set aside the sale.”

Objections, to reports of sale that might have been interposed in the circuit court cannot be raised on review.<sup>17</sup>

It is the duty of the master to offer the land for sale in separate parcels if the same is susceptible of division. But if this is omitted, an objection that thereby the land was sold for an inadequate price, will not be sustained unless proof is offered sustaining the objections, and this too when the rights of minors are involved.<sup>18</sup>

In *Ayers v. Baumgarten*, 15 Ill. 444 (R. R.), in reversing a decree of the circuit court with directions to confirm a guardian's report of sale the supreme court observes:

“The sale having been made in good faith, and the terms of the order having been complied with, the purchaser is entitled to hold the property, unless the inadequacy of the price requires that the sale be set aside. The English practice is to open the biddings at a master's sale before conformation of the report, on the offer of a reasonable advance upon the sum bid at the sale, and the payment of the expense of the purchaser; and the party applying to have the biddings opened is required to deposit the amount of such advance and expenses. \* \* \* But this practice of the English courts, in opening bids has not been adopted in this country. \* \* \* Even if the English practice prevailed here, this case would not fall within it. No money was brought into court; nor was any binding offer of an advance upon the price. There was therefore, no certain

17—*McCracken v. Droit et al.*, 108 Ill. 430 (Af.); *Ward et al. v. Ward et al.*, 174 Ill. 432 (Af.).

18—*Bowen v. Bowen*, 265 Ill. 638 (Af.).

assurance that the property would bring any more on a re-sale. As a general principle, mere inadequacy of price is not a sufficient cause for setting a sale aside."

In *Coffey v. Coffey*, 16 Ill. 141 (Af.), a report of sale in a partition cause was set aside. A successful bidder at the sale had made use of language depreciating the value of the land. After citing the 15 Ill. *Ayers* case the court observes: it is "the power, right and duty of the court to supervise, protect and preserve the parties from all fraud, unfairness and imposition"—rule adopted.

Error to set aside a sale in partition for mere inadequacy of price. *Comstock et al. v. Purple et al.*, 49 Ill. 158 (R.); *Duncan et al. v. Sandets et al.*, 50 Ill. 475 (R. R.); *Heberer v. Heberer et al.*, 67 Ill. 253 (R. R.).

In defining what is meant by "inadequacy of price," the court in *Booker v. Anderson*, 35 Ill. 66, page 87, says: (Price given \$11.25; witnesses say land worth \$12-\$15).

"This does not show a sacrifice of the property, requiring the interposition of a court of equity. It is not probable that it is a greater difference than usually occurs on a forced sale of such property. And unless there has been such sacrifice as amounts to fraud, equity will not relieve."

In refusing to confirm a sale the court says: "It is much the better practice of the chancellor, in ordering sales of property, to fix the time and manner in which notice shall be given, together with the terms and conditions of the sale." *Sowards v. Pritchett*, 37 Ill. 517 (Af.).

In *Comstock et al. v. Purple et al.* 49 Ill. 158 (R.), the court says: "Admitting the land sold for an inadequate price, the doctrine of this court is, that, of itself, is not sufficient unless it should be so grossly inadequate as to establish fraud."

In *Quigley v. Breckenridge*, 180 Ill. 627 (R. R.), one of the defendants in a partition case filed exceptions to

the report of sale, the purchaser filed an answer denying the truth of the matters set up in the exceptions. The circuit court sustained the exceptions to the report; and the purchaser at the sale appealed. The supreme court in reversing says: there was direct contradiction, between the purchaser and one who claimed he would have been a purchaser at a higher figure than the one accepted, and no money was brought into court or assurance given that on a re-sale more would be obtained.

Error to set aside sale without notifying purchaser. *Schulz v. Hasse*, 227 Ill. 156 (Af.).

In *Osmond v. Evans*, 269 Ill. 278 (Af.). Partition sale. Report of sale confirmed. On appeal, court in affirming says: "No money brought into court or bond given to guard against loss at a re-sale."

#### PARTITION—ATTORNEY FEES

In all proceedings for the partition of real estate, when the rights and interests of all the parties are properly set forth in the petition or bill, the court shall apportion the costs, including a reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some one of them, shall interpose a good and substantial defense to said bill or petition. In such case the party or parties making such substantial defense shall recover their costs against the complainant, according to equity.

Session Laws 1869, page 368.

Session Laws 1889, page 214.

Section 40, Chap. 106, Revised Statutes 1874.

The conditions under which an allowance for solicitor's fee may be obtained are: The suit must be an amicable one, the rights of all the parties must be so set out in the bill or petition as to render it unnecessary

for the defendant to employ counsel to protect his or her rights.<sup>19</sup>

The fee allowed must be what is usual, reasonable and what is customary where contracts have been made with persons competent to contract.<sup>20</sup>

On review the order allowing a solicitor's fee must be supported by evidence preserved according to the rules of chancery practice.<sup>21</sup>

In *McMullen et al. v. Reynolds*, 209 Ill. 504 (R. R.), where six attorneys testified they were engaged in the active practice of law in the County of Cook, and that they were acquainted with the usual and customary fees of solicitors in partition suits in said county, and that \$5,000 was a reasonable solicitor's fee in said case, and four attorneys called by the defendants testified that the customary charge would be \$200 to \$350, the court submitted that question to a committee of unsworn attorneys selected and called upon his own motion, who after retiring and considering the question reported that \$2,000 would be a reasonable fee, which sum was adopted by the court and a decree entered.

19—*Kilgour et al. v. Crawford et ux*, 51 Ill. 249 (R. R.); *Walker v. Tink*, 159 Ill. 325 (R. R.); *Stolard v. Nycum*, 240 Ill. 472 (R. R.); *Strenger v. Edwards*, 70 Ill. 631 (R. R.); *Watcher v. Doerr*, 210 Ill. 247 (R. R.).

20—*Reynolds et al. v. McMillan*, 63 Ill. 46 (R. R.); *Lilly et al. v. Shaw et al.*, 59 Ill. 72 (R. R.); *Hartwell v. De Vault*, 159 Ill. 325 (R. R.); *Goodwillie et al. v. Millimann*, 56 Ill. 523 (R. R.); *Joest v. Adel*, 209 Ill. 432 (R. R.); *McMullen et al. v. Reynolds*, 209 Ill. 504 (R. R.); *Hynes v. Jennings*, 262 Ill. 268 (R. R.).

21—*Goodwillie et al. v. Millimann*, 56 Ill. 523 (order taxing a solicitor's fee reversed.)

*Metheny v. Bohn*, 164 Ill. 495 (R. R.).

*Stortz v. Buttiger*, 247 Ill. 494, about attorney's fee.

See *Cheney v. Ricks*, 168 Ill. 533. An attorney who is interested cannot have allowed an attorney fee.

See attorney fee \$1200 not allowed. *Manfield v. Wallace*, 217 Ill. 610.

*McMullen et al. v. Reynolds*, 209 Ill. 504 (R. R.); *Jones v. Young et al.*, 228, 374 (Af.); These cases are cited in *Hynes v. Jennings*, 262 Ill. 268 A. & R. Where the circumstances are stated that must exist to warrant charging a solicitor's fee against all parties.

The supreme court in reversing says: (Citing Goodwillie v. Millimann, 56 Ill. 523; Albright v. Smith, 68 Ill. 181; Spring v. Collector of the City of Olney, 78 Ill. 101; Metheny v. Bohn, 164 Ill. 495). "The action of the court in calling before it said committee and in submitting to the committee for decision a matter which it alone had power to determine upon sworn testimony, and basing its decree thereon, was reversible error." It was also held error to "enter judgment and order execution for the solicitor's fee in favor of the solicitor instead of the complainant."

## PETITION FOR PARTITION

State of Illinois }  
County of ..... } ss.

Court  
Term A. D. 19....

To the Honorable Judge of the said court.

Your petitioners (here give full name of all who join in the petition) respectfully represent unto your Honor that the following described premises, to-wit: (here set out in full a description of the premises) are held in (joint tenancy, tenancy in common or co-parcenary, as may be the fact) by your petitioners together with (here insert the names of all others interested, to be made defendants to the petition).

Your petitioners and the said defendants derive title to the said premises by (set out in detail "by purchase," "devise" or "descent") from (John Doe).

That all of said claimants are of full age except (give full names) who are minors; that your petitioners and said defendants are all the persons entitled to said premises in possession, remainder, reversion or otherwise, including "tenants for years," "for life," or "in dower."

That one (Richard Roe) deceased, whose heirs at law are unknown to your petitioners, appears at one time to have had some interest in the said premises, the share or quantity of said interest is unknown to your petitioners. Said unknown heirs are made parties defendant to this petition.

Your petitioners pray for a division and partition of the said premises according to the respective rights of the parties interested therein, or that if a division and partition of the same cannot be made without manifest prejudice to the owners, a sale thereof shall be made, as provided by statute and the proceeds divided according to the respective rights of the parties; that a guardian AD LITEM be appointed for said minors.

Your petitioners further pray that a writ of summons may issue against said defendants returnable at the next term of this court.

J. D., Attorney for Petitioners.

A. B.

S. P.—10

State of Illinois, }  
County of..... } ss.

A. B. being first duly sworn on his oath says: That he is one of the petitioners to the above and foregoing petition, that he has read the said petition and knows the contents thereof; that the matters and things therein stated are true in substance and in fact.

Subscribed and sworn to before me  
this.....day of.....A. D. 19...

A draft prepared by counsel, embodying the findings of the court, the adjudications of the court upon the rights of the parties, and the appointment of commissioners with directions as to their duties, should follow the approved form under the chancery practice.

State of Illinois, } ..... County }	ss.	Circuit Court,
A	}	Partition
vs.		Under the Statute.
B		
State of Illinois, } ..... County }	ss.	

I do solemnly swear that I will fairly and impartially make partition of the premises mentioned in the decree rendered by the court in the above entitled cause on....., according to the rights and interests of the parties, as declared therein by the decree of the court, if the same can be done consistently with the interests of the parties; or if the same can not be so divided without manifest prejudice to the parties in interest, that I will fairly and impartially appraise the value of each piece or parcel of the premises sought to be divided, and a true report make to the court, so help me God.

Subscribed and sworn to before me  
this.....day of.....

State of Illinois, } ..... County }	ss.	Circuit Court,
A	}	Partition
vs.		Under the Statute.
B		

To the Honorable Judges of said Court:

In pursuance of a judgment rendered in the above entitled cause, on ....., 19..., we, the commissioners therein named, respectfully report to the court, that after each of us having taken and subscribed an oath fairly and impartially to make partition of the premises mentioned in

said decree, according to the rights and interests of the parties as declared therein by the decree of court, if the same could be done consistently with the interest of the parties; or, if the same could not be so divided without manifest prejudice to the parties in interest, that we would fairly and impartially appraise the value of each piece or parcel of the premises sought to be so divided, and a true report make to the court which said oath is hereto attached marked Exhibit A.; we went upon the premises described in said decree, to-wit:

And upon examination thereof, we determined and so report to the court, that the said premises and each piece and parcel thereof, are not susceptible of division without manifest prejudice to the parties in interest. We further report that we have fairly and impartially appraised the value of each piece or parcel of the premises sought to be divided, and fixed the value of each piece or parcel separately, as follows, to-wit:

We appraised the.....at.....  
 We appraised the.....at.....  
 We appraised the.....at.....  
 We appraised the.....at.....  
 We appraised the.....at.....

And we further report that the items of our expense attending the execution of said decree are contained in a bill hereto annexed marked Exhibit B. and made part of this report.

All of which is respectfully submitted.

IN WITNESS WHEREOF, we, the commissioners, have set our hands and seals to this our report this.....day of.....

.....[SEAL]  
 .....[SEAL]  
 .....[SEAL]

State of Illinois, }  
 ..... County } ss.

Circuit Court.

..... Term, A. D....

A. B.  
 vs.  
 J. D.

}

Partition  
 Under the Statute.

And now on this.....day of....., it being still of the.....Term, A. D. 19..., of the Circuit Court of.....County, Illinois, come the Petitioners by their attorneys and the Defendants by their attorney, and it appearing to the Court that the commissioners heretofore appointed herein by the Court to make partition of the premises hereinafter mentioned, have made report that the same are so circumstanced that a division thereof cannot be made without manifest prejudice to the parties in interest; and the Court having examined the said report doth find that said commissioners have, in all respects, proceeded in accordance with the law and the order of this Court heretofore made, said report is therefore approved and confirmed; and said cause coming on further to be heard on said report and the argument of counsel,

and the Court being fully advised in the premises, doth order, adjudge, and decree that the said premises, to-wit: (Here set out the premises), be sold at public auction to the highest and best bidder for cash, provided the bid upon each piece or parcel shall equal or exceed two-thirds of the valuation put upon the said premises by the said commissioners.

A. B. is appointed commissioner to carry into effect this Decree; to offer said premises for sale in separate tracts; and then to offer the entire premises in one parcel and to sell said premises in whichever way will bring the most money. Said sale to be made.....

.....  
The commissioner will first give public notice of such sale, stating the time, place, and terms thereof, by publication in some newspaper printed and published in said County, for at least.....weeks prior to said sale, and by posting written or printed notices thereof in not less than five (5) of the most public places in the neighborhood where said premises are situated; and upon confirmation of the report of sale to execute deed or deeds to the purchaser or purchasers of the said premises. The commissioner shall bring the money realized from the sale of said premises into Court to be distributed to parties entitled thereto under the order and direction of this Court. The commissioner to make report to the.....Term of this Court.



## CHAPTER XII

### RECORD PROPER—SPECIAL ASSESSMENTS

The petition, copy of the ordinance, report of commissioner, required by statute (R. S. 1874, p. 232, Ch. 24, Sec. 119 and 120, and Sec. 37, Act of 1897, Sess. Laws, p. 114)<sup>1</sup> to be filed, assessment roll, statutory notice, objections of property owners, in the nature of special pleas at law, and orders of court, constitute the record proper.<sup>2</sup>

Under section 37, of the Act of 1897 (Sess. Laws, p. 114) there is a provision that there shall be filed, with the petition, a copy of the ordinance, certified by the clerk under the corporate seal, a copy of the recommendation of the board, and the estimated cost, as approved by the board. It is enough if these documents are filed with, or attached to the petition. They stand in the place of a declaration in a common law case.

In cases where the statute requires a notice to be published, and a certificate of publication to be subscribed by the publisher and filed in the cause, though the notice is part of the record proper, the certificate is not, because oral evidence may be substituted, and when the record is collaterally assailed, the presumption will be that any defects in the certificate were cured by oral proof.

The documents, considered on direct review of a de-

1—R. S. 1874, p. 232 and Session Laws 1897, p. 114.

2—Lundberg v. Chicago, City of, 183 Ill. 572 (R. R.); Foss v. Chicago, City of, 184 Ill. 438 (R. R.);

Maxwell v. Chicago, City of, 185 Ill. 18 (R. R.); Kuester v. Chicago, 187 Ill. 21 (R. R.); Hulings et al. v. Chicago, City of, 192 Ill. 625 (R. R.).

fault confirmation proceeding, in the absence of a bill of exception, afford a test of what makes up the record proper.

The rule is illustrated by the following default cases in which the record has been reviewed:

A certificate of publication was not signed as required by the statute (R. S. 1874, p. 723) as appeared from its face, and it was held that the court had no jurisdiction to enter judgment of confirmation.<sup>3</sup>

It was contended on review that an ordinance could not be attacked for invalidity because there was no bill of exceptions in the record. The attack was sustained on the ground that the ordinance was a part of the record proper, and no question of fact was raised requiring a bill of exceptions.<sup>4</sup>

A petition recited an ordinance and a report of the estimated cost made by persons appointed by the city council, but it appeared on the face of the record, that the report had not been made under the ordinance recited in the petition.<sup>5</sup>

A statutory report was signed by only two of the three commissioners appointed by the city council, and the court says: "The judgment of confirmation must be reversed, for the foundation of a valid judgment is a valid ordinance and a valid report."<sup>6</sup>

Again a point made and sustained for reversal was: That only two of the persons appointed to "estimate the cost of the improvement acted in making such estimate and reported the same to the city council." There could be no presumption that a third member was present.<sup>7</sup>

On a writ of error a judgment by default, confirming

3—Kearney et al. v. Chicago, City of, 163 Ill. 293 (R. R.).

4—McChesney et al. v. Chicago, City of, 151 Ill. 307 (R. R.).

5—Clark v. Chicago, City of, 155 Ill. 223 (R. R.).

6—Moore et al. v. Mattoon, City of, 163 Ill. 622 (R.).

7—Hinkle v. Mattoon, City of, 170 Ill. 316 (A. & R.).

a special assessment, was reversed because the estimate of costs was signed by two members only, and there was no evidence that the other member took any part in making the estimate.<sup>8</sup>

The estimate of costs of an improvement was not signed by the original three commissioners appointed, but one new man was substituted. The property owner was defaulted and a confirmation judgment was reversed upon a writ of error because the commissioners' report was a part of the record proper.<sup>9</sup>

An ordinance provided for a "stone curb" to be firmly bedded upon "flat stones" not otherwise described. Property owners objected. Ordinance void for uncertainty, etc. The defendants in error ask the court to presume, as there was no bill of exceptions, that there was evidence heard below as to local meaning of "flat stones." Court says: "This is a statutory proceeding, and there can be no presumption as to oral evidence."<sup>10</sup>

On a writ of error, it was held that the certificate of the city clerk is no part of the ordinance that the statute requires to be filed with the petition. "The same rule must be applied with respect to the commissioners appointed to estimate and report the cost of the improvement," as is applied to the commissioners appointed to spread the assessment. "There is no ground upon which the distinction in that respect between the two sets of commissioners could rest. It does not appear that the third commissioner acted with those who made the report, or took any part in the proceedings."<sup>11</sup>

On appeal the point was made that the court below had proceeded, without having on file an assessment roll. In holding this error, the court says. "The existence of the assessment roll, as a part of the record

8—*Phelps v. Mattoon, City of*, 177 Ill. 169 (R. R.).

9—*Markley v. Chicago, City of*, 170 Ill. 358 (R. R.).

10—*Kelly et al. v. Chicago, City of*, 193 Ill. 324 (R. R.).

11—*Adcock v. Chicago, City of*, 160 Ill. 611 (R. R.).

and files of the court, is a *jurisdictional fact*, without which the court has no authority to act, or render judgment against the property involved in the proceeding.”<sup>12</sup>

On a writ of error, with reference to an assessment roll being only the act of two of the commissioners, the court observes: “It does not appear from the roll or certificates in the case at bar, that the three commissioners acted together, or that more than two of them acted at all in making the assessment. It was, therefore erroneous to confirm such assessment.”<sup>13</sup>

OBJECTIONS THAT ARE RAISED TO MATTERS OUTSIDE THE  
RECORD PROPER, IN THE ABSENCE OF A BILL OF EX-  
CEPTIONS, CANNOT BE CONSIDERED ON REVIEW

On a writ of error (a judgment of confirmation by default), the point urged for reversal was: It did not appear that the ordinance was ever passed by the city council; or, if passed, the “estimate of the cost of the improvement” was made before the passage of the ordinance. These objections were not sustained. Court says: “The petition recites that on a certain day mentioned, prior to the filing of the petition, the ordinance was passed by the city council, and that a certified copy of the ordinance is attached to the petition. A copy of the ordinance is attached to the petition, but objections are made to the form of the attached certificate of the clerk. The certificate of the clerk is no part of the ordinance, and the statute does not require that any such certificate should be attached or be recited in the petition. There is no *bill of exceptions* in the record,

12—Morrison v. Chicago, City of,  
142 Ill. 660 (R. R.).

13—Larson et al. v. Chicago, City  
of, 172 Ill. 298 (R. R.).

and the passage of the ordinance could well have been proved without any such certificates.”<sup>14</sup>

#### NOTICE IS PROCESS

In special assessment proceedings and applications for judgment against lands delinquent, in consequence of the non-payment of taxes or assessments, the statute requires *notice* to be given before any final action be taken that will bind the property owner. This notice is the process that stands in the place of a common law summons; the affidavit that is required of the posting or mailing of the notices, and the certificates of the publisher of any notices required to be inserted in a newspaper, stand in the place of, and are analogous to, the return of a sheriff. This return, or what amounts to a return, is subject to amendment.

#### PROCESS AMENDED—DIRECT ATTACK

In a review by a writ of error, it appeared that the affidavit of sending notices did not state the date of sending. On notice given at a subsequent term, the court allowed an amendment. In sustaining this action, the court says: “The mailing of notices is the process provided by the statute as to owners whose names and places of residence are known, and the affidavit is evidence of compliance with the statute in that regard. It may be amended any time after judgment, so as to show the truth as to what was really done in the way of service.”<sup>15</sup>

An affidavit of mailing notices by commissioners is in

14—Wadlow v. Chicago, City of, 170 Ill. 316 (Af.); McChesney v. 159 Ill. 186 (Af.). The People, 178 Ill. 542 (Af.).

15—Hinkle v. Mattoon, City of,

the nature of a return, and may be amended to conform to the fact.<sup>16</sup>

#### SUCCESSFUL DIRECT ATTACK UPON A NOTICE

A notice of the filing of an assessment roll, required to be published "six days," was attacked in a direct proceeding. The validity depended upon the question whether a publication made on Sunday could be properly counted. The court in sustaining the attack thus observes: "The validity of this notice is clearly just what it would have been, if the charter had only required one publication, and that had been made on Sunday. Would such notice have been sufficient? At common law Sunday was, in a legal phrase, *dies non judicus*. No valid judicial proceeding could be had upon that day."

\* \* \* "The notice (quoting from page 149) stands in place of *process*, and it must be given on those days of the week which the law recognizes as appropriate to business of this character. To permit it to be given on Sunday is against the spirit and policy of our law."<sup>17</sup>

#### SUCCESSFUL COLLATERAL ATTACK UPON NOTICE

A successful collateral attack was made upon a default confirmation decree, that was supported by a notice which was signed by only two of the three commissioners appointed to do the act of which notice was being given. Court says: "The notice stands *in lieu* of process, and it is a familiar rule that a judgment rendered without the service of process, in the absence of appearance, is a nullity."<sup>18</sup>

16—Michael v. Mattoon, City of,  
172 Ill. 394 (R. R.).

17—Seammon v. Chicago, City of,  
40 Ill. 146 (R.).

18—Boynton v. The People, 155  
Ill. 66 (R. R.); McChesney v. The  
People, 148 Ill. 221 (R. R.).

UNSUCCESSFUL DIRECT ATTACK UPON CERTIFICATE (PROCESS)  
OF PUBLICATION

In the absence of a bill of exceptions, we cannot consider or determine objections which have no foundation except in facts alleged to have been disclosed by testimony.<sup>19</sup>

The appellant appeared and filed a special appearance. Point made that the certificate of publication was defective. The court allowed oral evidence to cure the defect. Held that the fact that the statute provided for proof by certificate did not preclude the proof orally.<sup>20</sup>

Appeal objections filed. The point was made, that the ordinance had not been published one week, as required by statute, before action by the council. Evidence below was offered in support of the objection, but when it was overruled, no exception was taken by appellants. Held, that this ruling could only be made a part of the record by a bill of exceptions.<sup>21</sup>

Writ of error, as to persons not appearing below the affidavit of service of notice was defective. One commissioner made an affidavit, saying that he had sent the notice to every person whose residence was known to *him*. The statute required the notice to be sent to every person whose residence was known to *anyone* of the commissioners. It was held that knowledge on the part of the other commissioners must be negatived, and the affidavit failed to do it.<sup>22</sup>

## CONFIRMATION JUDGMENT

Recitals in a confirmation judgment that all the requirements of the statute have been complied with *cannot* be overcome by a defective certificate.<sup>23</sup>

19—Parker v. LaGrange, Village of, 171 Ill. 344 (Af.).

20—Lingle v. Chicago, City of, 172 Ill. 170 (Af.).

21—Glose v. Chicago, City of, 217 Ill. 216 (Af.).

22—Murphy v. Peoria, City of, 119 Ill. 509 (R. & A.); Murphy et al. v. The People, 120 Ill. 234 (R. R.).

23—Stack v. The People, 217 Ill. 220 (Af.).

## SUCCESSFUL COLLATERAL ATTACK UPON PROCESS

A collateral attack upon a confirmation judgment which was supported by a certificate, which said "five times in the Chicago Mail" instead of "five successive days," as required by statute, was sustained.<sup>24</sup>

A certificate attacked showed the date of the first publication as the 5th of February and the last the 10th of February, 1892. The publisher's certificate was, however, made on the 8th of Feb., 1892. Court says: "It was impossible for the publisher to certify on the 8th of Feb., that the notice was published on the 5th and 10th of the same month. The court could not know whether the error was in the date of the certificate or date of the last publication. To obtain jurisdiction by means of publication, it must affirmatively appear, that the statute has been strictly pursued."<sup>25</sup>

## APPLICATION FOR JUDGMENT AGAINST LAND FOR THE PAYMENT OF DELINQUENT TAXES AND SPECIAL ASSESSMENTS

In applications in the county court for judgment against lands for the collection of taxes or special assessments, the *delinquent list* (collector's report sworn to) stands in the place of, and is analogous to, a declaration in a common law case.<sup>26</sup>

The collector files with the county clerk, five days before the term at which application for judgment is to be made, a list of the delinquent lands or town lots. This is what gives the court jurisdiction.<sup>27</sup>

24—Evans v. The People, 139 Ill. 559 (R. R.).

25—McChesney et al. v. The People, 145 Ill. 614 (R. R.); Chandler v. People, 161 Ill. 41 (R. R.).

26—Chiniquy v. The People ex rel., 78 Ill. 570; People ex rel. v. Draggstrain, 100 Ill. 286 (Af.);

Mann v. The People ex rel., 102 Ill. 346 (R. R.); Wiggins Ferry Co. v. The People ex rel., 101 Ill. 446 (R. R.); Smythe v. The People ex rel., 219 Ill. 76 (R. R.); People ex rel. v. Harper, Appellant, 244 Ill. 121 (Af.).

27—Morrill v. Swartz, 39 Ill. 108



*The publication notice*, which the collector is required to give by statute, stands in the place of a summons at common law and is a part of the record proper. The land against which judgment is sought must be accurately described so as to apprise the owner of just what land is to be taken; any variance between the delinquent list and the notice will be fatal to the judgment.<sup>28</sup>

#### DELINQUENT LIST (DECLARATION)—DEGREE OF CERTAINTY

The rule of certainty is thus stated by the supreme court: "Property must be described by reference to government surveys (1), or by metes and bounds (2) or, if it is divided into lots (3), then by reference to authenticated plats. If described by someone of these modes, then it can be ascertained and its locality easily determined."<sup>29</sup>

#### SUCCESSFUL DIRECT ATTACK UPON THE DELINQUENT LIST (DECLARATION) FOR FAILURE TO CONFORM TO THE RULE

There was a personal appearance of the land owner, but, as the declaration was not within the rule of certainty, there could be no judgment rendered, as it must be *in rem* and not *in personam*.<sup>30</sup>

A land owner appeared and resisted the entry of the confirmation judgment. In sustaining the land owner's

(R.); *People v. Otis*, 74 Ill. 384 (Af.).

28—*Fortman et al. v. Ruggles et al.*, 58 Ill. 207 (R. R.); *Karnes v. The People*, 73 Ill. 274 (R. & A.); *Buck v. The People ex rel.*, 78 Ill. 560 (Af.); *People ex rel. Appellees v. Harper et al.*, 244 Ill. 121 (Af.).

In *Nowlin v. The People*, 216 Ill. 543 (R. R.), following *McChesney v. The People ex rel.*, 174 Ill. 46 (R. R.), and *Drennan v. The People*

*ex rel.*, 222 Ill. 592 (R.), it was held that a notice and certificate that bear the file mark "Filed June 22, 1897, A. B. County Clerk" is not a compliance with the statute, requiring them to be filed as part of the records of the county court." Sec. 186 Rev. Act.

29—*People ex rel. v. Chicago & Alton R. R. Co.*, 96 Ill. 369 (Af.).

30—*People ex rel. v. Draggstan et al.*, 100 Ill. 286 (Af.).

right to resist a judgment of sale, the court observes: "In *Sanford v. The People*, where judgment was rendered against appellant's lot, and there was no plat made or recorded, judgment was reversed because a sale might embarrass her title."<sup>31</sup>

Judgment sought for a delinquent special assessment. A plat had been made, certified, signed but not recorded and the court says: "A judgment cannot be rendered against specific property, unless the property itself is pointed out. As no plat was recorded as required by statute, there were no lots described which any taxes, or a *lien* for taxes could attach."<sup>32</sup>

DELINQUENT LIST AND NOTICE SUCCESSFULLY ASSAILED  
COLLATERALLY

In an action of ejectment, a delinquent list of lands (declaration) was assailed collaterally for the reason that the collector stated the whole amount of taxes, but did not state what portion of the tax was "state" and what portion was "county." The court held that the judgment and tax were void.<sup>33</sup>

In an action of ejectment, the plaintiff relied upon a tax deed. In the record proper offered in support of the tax proceeding, there was omitted from the notice, that the collector is required to give, that "an order of sale" for the land would be applied for, and it was held that the "notice that such an order would be applied for was fundamental, and if neglected the subsequent proceedings are necessarily void."<sup>34</sup>

31—*People ex rel. v. Eggers*, 164 Ill. 515 (Af.).

32—*People ex rel. v. Clifford*, 166 Ill. 165 (Af.). Also, *Sanford v. People ex rel.*, 102 Ill. 374 (R. R.); *People ex rel. v. Beat et al.*, 107 Ill. 581 (Af.); *People ex rel. v. Rickert*, 159 Ill. 496 (Af.); *People ex rel. v. Owens App.*, 231 Ill. 311 (R., R.);

*Hook v. The People ex rel.*, 177 Ill. 632 (R. R.); *People ex rel. v. Cook*, 180 Ill. 341 (Af.); *Vennum v. The People ex rel.*, 188 Ill. 158 (R. R.).

33—*Morrill v. Swartz*, 39 Ill. 108 (R.).

34—*Charles v. Waugh*, 35 Ill. 315 (Af.).

In an action of ejectment, the collector's notice of his application for judgment did not contain a sufficiently accurate description of the land to enable the owner to know therefrom that an application for judgment against the land would be made, and it was held that the court had no jurisdiction and no title passed under the tax sale.<sup>35</sup>

A bill in equity was filed to set aside a tax deed. The owner had not appeared when judgment was entered against his land. An attack, based upon the fact that no notice of the application for judgment had been filed in the *office of the clerk of the county court*, was sustained. The court observed: "This requirement of the statute was mandatory and essential to give the court jurisdiction to render the judgment for the sale of appellee's land; and the failure to comply with the provisions of said statute rendered the judgment and the tax deed based upon the sale void."<sup>36</sup>

#### CASES WITHIN THE RULE OF CERTAINTY—DELINQUENT LIST

It is held that, if with the description given in the delinquent list (declaration) a surveyor can locate the land, a judgment against the lots or lands, when attacked directly, will be sustained.<sup>37</sup>

Estoppel—Owner may be estopped from asking an enforcement of the rule of certainty.<sup>38</sup>

35—Pickering v. Lomax et al., 120 Ill. 289 (Af.).

36—Glos v. Woodward, 202 Ill. 490; Brickey v. English et al., 129 Ill. 646 (Af.).

37—Law v. The People ex rel., 80 Ill. 268 (Af.); Fowler v. The People ex rel., 93 Ill. 116 (Af.); Ill. Cent. E. R. Co. v. The People, 170 Ill. 224 (Af.); Koelling v. The People ex rel., 196 Ill. 353 (Af.).

38—In Harts v. The People ex

rel., 171 Ill. 373, a plat dated Nov. 13, 1875, and recorded Nov. 13, 1875, made by Hilton and Bartlett, who alleged themselves to be the owners of all the lands platted, except blocks 1 and 2, was introduced as "Ashland's Subdivision." At the time the plat was made, Hart had become the owner of blocks 1 and 2. Thereafter, he conveyed the lots, describing them as 1 and 2 Ashland's Subdivision, and he had

## COUNTY COLLECTOR'S NOTICE OF APPLICATION FOR JUDGMENT

What the *notice*, which stands in the place of *process*, shall contain depends upon the statute, which must in every case be specially examined, as in its substance it is not subject to amendment.<sup>39</sup>

## NOTICE SUCCESSFULLY ASSAILED DIRECTLY ON ERROR

A judgment by default against lots for a special assessment reported delinquent was reviewed on error. The notice (advertisement) was held "defective for the reason that it omits to state that judgment will be applied for against the lands and lots named in the delinquent list, and for the further reason that there is a variance between the warrant, as described in the notice, and the warrant as described in the judgment record."<sup>40</sup>

## PUBLICATION CERTIFICATE—RETURN

When the statute requires a *notice* to be published, the publisher's certificate is not a part of the record proper, because oral evidence can be substituted in determining whether proper notice has been given.

The point was made that there was not sufficient proof of publication of the notice by the collector. Papers containing the notice to property owners were introduced in evidence, and the county treasurer swore that

also paid taxes by that description. On an application for a judgment against the lots for a delinquent special assessment, it was held he was estopped from questioning the description in the declaration.

39—Pike et al. v. The People, 84 Ill. 80 (Af.); People v. Reat et al., 107 Ill. 581 (Af.); Chambers v. The People ex rel., 113 Ill. 509 (Af.).

For practice of moving to strike objections from the files, see: People ex rel, Appellee v. Kankakee & Southwestern R. R. Co., 237 Ill. 362 (R. R.).

40—Gage v. The People ex rel., 188 Ill. 92 (R. R.).

they contained the list of delinquent lands that he had given the printer for publication. The objection was overruled.<sup>41</sup>

The supreme court refused to reverse a judgment in favor of the collector, that was supported by a certificate alleged to be defective, because there was no certificate of evidence in the record showing what the court may have heard with reference to it.<sup>42</sup>

## CERTIFICATE AMENDED

A judgment, that was supported by a certificate that had been amended, was sustained. In this case a special objection had been entered to test the jurisdiction of the court.<sup>43</sup>

PUBLISHER'S CERTIFICATE DEFECTIVE—OVERCOME BY  
PRESUMPTIONS—COLLATERAL ATTACK

When a proceeding is called in question collaterally, and the jurisdiction of the court of the person in the record assailed depends upon a notice given by publication, and the certificate is defective, the *presumption*, when there are recitals in decree, will be indulged that other evidence was heard that established the existence of the facts that are defectively certified to.

In a certificate of publication, the publisher did not state the name and state where the paper was published. Held: That the presumption would be indulged, when the record was assailed collaterally, that this was done to the satisfaction of the court.<sup>44</sup>

The statute says that the printer's certificate shall be sufficient evidence of publication. It does not exclude

41—*Durham v. The People ex rel.*,  
67 Ill. 414 (Af.).

42—*Bass v. The People ex rel.*,  
159 Ill. 207 (Af.).

43—*McChesney v. The People*,  
178 Ill. 542.

44—*Pierce v. Carleton et al.*, 12  
Ill. 358 (Af.).

any other mode of proof. It is competent to prove the publication by other evidence. If necessary the court would presume that other evidence was adduced.<sup>45</sup>

A certificate did not state the date of the first paper. The certificate was: Six days consecutively (except Sundays and holidays) commencing with Sept. 24, 1868. Held defective, because the court could not tell how many days the publisher regarded as holidays.<sup>46</sup>

Referring to the Pierce case, the court says that the presumption was indulged in consequence of the court finding that due publication had been made.<sup>47</sup>

In a direct proceeding, the certificate did not recite that the newspaper was published in the county. Held: That the court might hear other evidence and so establish the fact. The presumption would be that it had.<sup>48</sup>

An executor had sold land under a decree that made a finding as follows: "It appears to the court that the said defendants have been duly notified of the pendency of said petition by publication in accordance with the statute in such case made and provided. Held: That this could not be contradicted by a notice that was defective in omitting one of the statutory requisitions. Presumption would be indulged that another publication notice had been given.<sup>49</sup>

Administrator's sale attacked collaterally. A defective publication certificate is overcome by recitals in the decree finding that due and proper service has been had.<sup>50</sup>

The affidavit of a non-residence was defective because the jurat did not recite the word "sworn." The judgment record recited that "due proof" was made. Held:

45—Pile v. McBratney, 15 Ill. 314 (R. R.).

46—Rue et al. v. Chicago, City of, 57 Ill. 435 (R. R.).

47—Haywood v. Collins et al., 60 Ill. 328 (R. R.).

48—Spellman et al. v. Mathewson et al., 65 Ill. 306 (Af.).

49—Harris v. Lester et al., 80 Ill. 307 (Af.).

50—Sloan v. Graham et al., 85 Ill. 26 (R. R.).

That it would be presumed that the party making the affidavit had been sworn.<sup>51</sup>

In a direct proceeding application for judgment against land for delinquent taxes. Court says: That it will be *presumed* on appeal, in the absence of a bill of exceptions, that upon application for judgment for taxes the court below heard evidence to establish the proper publication of the delinquent list, even though the printer's certificate is defective.<sup>52</sup>

In a *direct* proceeding, appeal from a judgment of confirmation of a special assessment, the court said: "Parol evidence may be received to prove notice was published."<sup>53</sup>

Again it was held that the *recitals* of the decree as to publishing and mailing notices could not be overcome by a publisher's certificate.<sup>54</sup>

A confirmation judgment recited: "That L. S. Ham, special assessor, has in all things with reference to giving notice complied with the law." The publisher's certificate showed that the first publication was on Sunday, August 21, 1898, which was a day upon which notice could not be legally given. Held that the certificate could not be successfully attacked on the ground of the defective certificate.<sup>55</sup>

A certificate of publication did not recite that the newspaper was one of "general circulation in the county." There was a recital of the fact that the "notice of publication was in due form and that it was published according to law." In collateral proceedings, the presumption is that the court heard other evidence.<sup>56</sup>

51—Bickerdike v. Allen et al., 157 Ill. 95 (Af.).

52—Bass v. The People, 159 Ill. 207 (Af.).

53—Lingle v. Chicago, City of, 172 Ill. 170 (Af.).

54—Young v. People, 171 Ill. 299 (Af.).

55—Ill. Cent. R. R. Co. v. The People, 189 Ill. 119 (Af.).

56—Hereford v. The People, 197 Ill. 222 (Af.).

A defective certificate of publication will not, in same record, overcome a recital in the decree.<sup>57</sup>

In a bill in equity attacking a sale made in an administration proceeding, in which it appears the files were lost except the decree which contained the *recital*, the court says: "It appearing to the court that the said defendants have each been notified of the pendency of said petition by publication in accordance with the statute, in such case made and provided." It was attempted to introduce what purported to be copies of the burnt record, that would show that the publication notice was defective. Held: That this could not be done. There was nothing in the record to contradict this *recital*, and the court held that it must obtain and be sufficient to withstand the attack. *Record* cannot be contradicted by evidence outside the record itself.<sup>58</sup>

A bill in equity attacked an administrator's sale made in the county court. From the certificate *on file* the notice was not published the statutory times. Held: That it would be *presumed* that the court (county) heard other evidence to warrant its finding which was sufficient. "It appearing to the satisfaction of the court, that due notice had been given of the pendency according to law by publication."<sup>59</sup>

In a collateral proceeding, the point was made that the affidavit of *non-residence* was defective because the *jurat* did not recite the word "sworn." The judgment record recited that "due proof" was made. Held that it would be presumed that the party making the affidavit had been sworn.<sup>60</sup>

A confirmation judgment was assailed. *Recital* was: "Commissioners heretofore appointed by the court to make the assessment have in all things complied with

57—Barnett v. Wolf, 70 Ill. 76 (Af.).

58—Harris v. Lester, 80 Ill. 307 (Af.).

59—Sloan v. Graham et al., 85 Ill. 26 (R. R.).

60—Bickerdike v. Allen, 157 Ill. 95 (Af.).



the law as to the posting, publishing, and mailing, notices." Court says that this is conclusive on collateral attack. Certificates and affidavits in the confirmation record were not sufficient; and the three men did not sign who had been appointed by the court. The court further says that the court, in the confirmation record may, or may not, have acted on these papers. "They cannot be permitted, on a collateral attack, to contradict and overthrow the solemn judgment of the court." (Citing, *Casey v. People*, 165 Ill. 49; and *Hertig v. People*, 159 Ill. 237.)<sup>61</sup>

Two certificates were assailed in the record taken up and one in the *assailing* record. It was attempted to show that the finding in the record assailed was untrue by introducing the copies of the newspaper, and thereby showing that no notice such as is referred to in the certificate appeared. Court says: "In the record of the confirmation proceeding, there appeared a certificate which was sufficient if true, and the judgment *recited* that the facts alleged in such certificate were true, consequently it will be assumed that the court had sufficient evidence before it to warrant the rendering of the judgment."<sup>62</sup>

In a confirmation record, the certificate was fatally defective. There was a finding of *due notice* as required by law. *Recital cannot be overcome by defective notice.*<sup>63</sup>

#### EXECUTION UNDER JUDGMENT FOR SALE OF DELINQUENT LANDS

"The clerk of the county court shall, before the day of sale, make a correct record of the lands and town lots against which judgment is rendered in any suit for

61—*Young v. The People*, 171 Ill. 299 (Af.).

62—*Hertig v. The People*, 159 Ill. 237 (Af.).

63—*Casey v. The People*, 165 Ill. 49 (Af.).

taxes due thereon, and shall set forth the name of the owner, etc. \* \* \* and shall attach thereto the order of the court, and his certificate of the truth of such record, which record so attested, shall hereafter constitute the *process*, on which all real property shall be sold for taxes, as well as the sale of such property." Section 194, Ch. 120, R. S. 1874. (2 Purple, Stat. Sec. 418, page 965.)

In referring to the above section, the court in *Eagan v. Connelly*, 107 Ill. 458 (Af.), observes: "Although, therefore, not technically *process*, it, answering the place and performing the office of an execution, should in respect to amendments, be governed by the same rule applicable to amendments of executions. The amendments ought not, in any event, to have been allowed without notice to the opposite party."

This was an ejectment case and the record under which the sale was made "was not signed or sealed by the county clerk, nor did it have any certificate of his attached thereto at the time of sale. Sixteen years thereafter it was attempted to be amended. The court observes: "No subsequent amendment can relate back to and make valid a sale under and by virtue of such a void process. There having been no precept at the time of the sale, the collector had no authority to make the sale. His act was a nullity, and the purchaser could base no right thereon."

Judgment sale of lands for taxes not made under the statutory process (record certified by the clerk) when attacked collaterally have been held to be void.<sup>64</sup>

64—*Bell v. Johnson*, 111 Ill. 374 (Af.); *Glos v. Hanford et al.*, 212 (Af.). Also: *Ogden v. Bemis*, 125 Ill. 261 (Af.).  
*Ill. 105 (Af.)*; *Ames v. Sankey*, 128 Ill. 523 (Af.); *Glos et al. v. Randolph*, 138 Ill. 288 (Af.); *Kepler et al. v. Scully*, 185 Ill. 52 (Af.); *Glos et al. v. Gleason*, 209 Ill. 517 (Af.).  
 The *People ex rel. v. Henckler et al.*, 137 Ill. 580, was a collateral attack upon a record that showed that the clerk had substituted "his own private scrawl for the official seal

CERTIFICATE OF PUBLICATION—PROCESS—DEFECTIVE NOTICE  
CURED BY APPEARANCE

The entry of appearance will amount to a waiver of all defects in the notice and the certificate (return), and will have the same effect as the like act in a common law or chancery cause.<sup>65</sup>

PRIMA FACIE CASE—MADE BY COUNTY COLLECTOR

The introduction of the record proper will entitle the collector to judgment, unless objections, which are in the nature of special pleas at law, and so constitute a part of the record proper, are filed.<sup>66</sup>

HEARING BEFORE THE COURT IN AN APPLICATION FOR JUDGMENT AGAINST LAND FOR DELINQUENT TAXES AND SPECIAL ASSESSMENT PROCEEDINGS—REVIEW OF FACTS

The differentiating feature of a law record from a chancery and a statutory one is, that in the former, a jury passes upon the facts, and, without consent or waiver of the party to be affected, no judgment can be sustained that is not supported by the verdict of a jury.

of the court." Held that the provision of the statute is mandatory and the process void. The collector no right to make sale.

65—People ex rel. v. Sherman et al., 83 Ill. 165 (R. R.); Hale v. The People ex rel., 87 Ill. 72 (Af.); Mix v. The People ex rel., 106 Ill. 425 (Af.); Ill. Cent. R. R. Co. v. People ex rel., 170 Ill. 224 (Af.); McChesney v. The People ex rel., 178 Ill. 542 (Af.).

66—Mix v. The People, 81 Ill. 118 (Af.); Kirchman v. The People, 159 Ill. 265 (Af.); People v.

McWethy, 165 Ill. 222 (R. R.); Walker v. The People, 166 Ill. 96 (Af.); McManus v. The People, 183 Ill. 391 (Af.); People v. Keener, 194 Ill. 16 (R. R.); People v. Givens et al., 123 Ill. 352 (R. R.); Wiemers v. The People, 225 Ill. 82 (Af.); Hurd v. The People, 221 Ill. 398 (Af.).

The point was made that a change of venue and a jury trial were denied. It was held that the proceeding was not a suit in legal parlance and no jury trial could be had. (See Mix v. The People, 86 Ill. 312 Af.)

It has been adjudicated that, when questions of fact are to be reviewed or the evidence weighed, in applications for judgment against lands for delinquent taxes, and in special assessment proceedings, the Statute of 1837 (Session Laws, p. 109; R. S. 1874, Sections 61 and 62, Ch. 110) applies, and the common law practice must be followed in making up the record.

That is, the finding of the court must be excepted to, if any question of fact is to be reviewed; and the exceptions must be saved and entered in the record, upon the finding or judgment of the court and to the rulings of the court upon the evidence upon purely law questions. (See note under 67.)

If a jury trial is had in a special assessment proceeding upon the question of benefits, and it is desired that the facts be reviewed on error or appeal, it is necessary to make a motion for a new trial, and preserve the ruling thereon together with the evidence in the bill of exceptions. When a jury is waived, the court's finding of fact or the judgment pronounced and entered must be in the bill of exceptions.<sup>67</sup>

In an appeal from an order of the county court reducing the inheritance tax in the estate of Richard W. Mills, the state insisted that the evidence did not justify

67—Melrose, Village of v. Bernard, 126 Ill. 496 (Af.). Also: Mullen v. The People, 138 Ill. 606 (Af.); C. & A. R. R. Co. v. The People, 190 Ill. 20 (A. & R.); People v. C. & N. W. Ry. Co., 200 Ill. 289 (Af.); C. I. & W. Ry. Co. v. People, 205 Ill. 538 (A. & R.); Jones v. Milford, Village of, 208 Ill. 621 (Af.); Chicago, City of v. McCartney, 216 Ill. 377 (R. R.); Chicago, City of v. Ogden & Co., 227 Ill. 595 (Af.); People ex rel. Appellants v. C. B. & Q. Ry., 231 Ill. 112 (Af.); People ex rel. Appellee v. O'Gara Coal Co., 231 Ill. 172

(Af.); People ex rel. Appellants v. C. & N. W. Ry. Co., 231 Ill. 535 (Af.); Schafer et al. defendants in error v. Gerber et al., 234 Ill. 468 (Af.); People ex rel. Appellants v. White, 237 Ill. 164 (Af.); People ex rel. Appellees v. C. I. & St. L. Ry. Co., 243 Ill. 221 (Af.).

Note: Formal exception not necessary under amendment to Sec. 81, Prac. Act, Sess. Laws 1911, p. 459. (See People ex rel. Appellee v. C. B. & Q. R. R. Co., 273 Ill. 110 (Af. & R. R.).)

the finding. The court observes: "The proceeding is a statutory one, but the exception as to the admission of evidence, and as to the sufficiency of the evidence to sustaining the finding of the trial court, must be preserved by a bill of exceptions as in common law cases." The record did not contain any exception to the finding or judgment of the court.<sup>68</sup>

#### PRESUMPTIONS

In legal opinions, the rights of litigants are often disposed of under the use of the term "presumptions."

In common law causes, the writer of the opinion sometimes uses this expression: "We will presume that the court below had sufficient evidence before it," or that "it acted correctly," when what is really meant is, that a reviewing court, under the common law practice does not pass upon propositions of fact, only propositions of law.

At common law, a jury alone has to do with presumptions of fact.

In equity, where the chancellor finds the facts, it is proper to speak of propositions (presumptions) of fact as well as law, but they must be carefully distinguished.

The cases are numerous that illustrate the use of the term "presumption" when the court has declined to go behind the record proper, in the absence of objections filed and sustained by the county court, to question the legality and regularity of the proceedings of public officers.

On application for judgment against lands for sale, the plaintiff relied upon a judgment for taxes, precept, sale and deed from the sheriff, and claimed to hold pos-

68—People of the State of Illinois, Appellant v. Mills, 247 Ill. 620 (Af.).

Propositions, to be held as law,

under the statute (Sec. 41, R. S. 1874) do not apply, as no jury trial is allowed. (See People ex rel. v. C. B. & Q. R. R. Co., 231 Ill. 112).

session under his title. In the record assailed, there was silence as to the "return by the collector five days before the sitting of the circuit court" and the court held: "If the time do not appear, the law will *presume* that he did his duty in that respect."<sup>69</sup>

Again, a confirmation judgment was assailed collaterally, and the point was made that it did not appear, that the land owners had notice ten days before the first day of the term. This judgment was given in evidence, but it did not state what the findings were, with reference to the sending of the statutory notice of jurisdiction, and the court holds that the *presumption* will be indulged that the court below had before it sufficient evidence to show that the confirmation record was supported by jurisdictional facts.<sup>70</sup>

PRESUMPTIONS—COLLATERAL ATTACK WHEN RECORD IS  
SILENT AS TO JURISDICTION

A leading case, that needs special examination in determining what presumptions may be indulged, when a record is attacked that is silent as to jurisdictional facts, is *Swearengen v. Gulick et al.*, 67 Ill. 208 (R. R.). It was an action of ejectment. Gulick claimed, under a decree of the circuit court, licensing an administrator to sell lands to pay the debts of his decedent: "The court by the petition, obtained jurisdiction to hear and determine the application by the administrator." The files in the case had been lost, and nothing appeared but the decree and the master's report of sale.

The point was made that the court did not have jurisdiction to render the decree because the widow's dower was directed to be assigned. The reply of the court is, that the circuit court, under the statute, had jurisdiction

69—*Jackson v. Cummings*, 15 Ill. 449 (Af.).

70—*Perry v. The People ex rel.*, 155 Ill. 307 (Af.).

to order the sale of the real estate and could not be ousted of jurisdiction by the widow filing a cross-bill for her dower.

The crucial question is stated thus: "Had there been a notice and certificate of publication found in the record, or had the decree recited that publication had been made; then the case would have been free from doubt; but neither of these appear in the record."

In holding that the record of the sale of decedent's land is sufficient to withstand collateral attack, the court says: "It, however, is a rule of uniform application that, in relation to superior courts or courts of general jurisdiction, nothing is presumed to be out of their jurisdiction but that which specially appears to be so; but, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged. This rule is limited to collateral proceedings, and where the record of a judgment or decree is relied on collaterally jurisdiction must be presumed in favor of a court of general jurisdiction, although it be not alleged or fails to appear in the record."

"According to the rule, we must presume that the court below had jurisdiction of the person of the defendant before the decree was rendered, and there being no evidence to rebut that presumption, it must be held that the decree and sale were amply sufficient to pass the title from the heirs to Somers, the purchaser at the administrator's sale."

Again, in an action of ejectment it was "claimed that the decree in the partition proceeding is void." It was claimed that three minors "were not brought into court by service of process."

Decree silent as to the service of these minors. It did not affirmatively show that they were served. But a guardian *ad litem* was appointed. After citing the Gulick case, the court observes: "Where the decree was silent as to the jurisdiction of the court over the defendants,

*in the absence* of evidence showing that jurisdiction was not acquired, it would be *presumed* that the court had jurisdiction. Service of process was the primary inquiry, and it will be presumed that the court first ascertained that fact before proceeding to adjudicate on other questions in the case."<sup>71</sup>

In the *Benefield* case, it does not clearly appear whether the record assailed was a statutory partition or partition in equity. Does not the rule laid down and referred to in the *Swearengen* case apply to the subject-matter rather than the parties: The rule (*Peacock v. Bell*, 1 Saund. 74) in the leading case cited on page 169 of the 34th Ill. Rep.: "Nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged," would seem to apply to the *res* rather than the parties.

In *Wenner v. Thornton et al.*, 98 Ill. 156 R. R., which cites the *Swearengen* case, the record recited that a summons had issued against unknown heirs. Held that this recital was sufficient to base a presumption that the statutory affidavit had been filed.

In *Reedy v. Camfield*, 159 Ill. 254, a bill was filed to redeem certain lands from sale under a foreclosure decree, and it was held that the findings in the decree were sufficient to warrant the presumption that the required affidavit of non-residence had been filed.

71—*Benefield v. Albert*, 132 Ill. 665 (Af.).

The court in *Swearengen v. Gulick* seems to overlook the point that when the circuit court renders a decree to sell land to pay debts of a decedent, it is not in the exercise of its common law and equity powers, as said in the *Donlin* case, 57 Ill. 348. It can be said in support of this decision, that the record showed

that the widow had filed a cross-bill for the allotment of dower. The court took jurisdiction of this cross-bill and adjudicated. The circuit court did this by virtue of its power as a court of equity, and the rule of presumption stated by the writer of the opinion would apply. The decree was not then one that was rendered in a statutory proceeding pure and simple.



In *Field v. The People*, 180 Ill. 376 R. R., an attack was made in ejectment upon a proceeding to sell a minor's land under a decree of the county court. The attack was based upon the fact that there was no petition in the record, and, therefore, there was "nothing to show that the court had jurisdiction of the subject-matter, hence the decree and deed are void." Here the ward was personally served with notice and an answer put in by a guardian *ad litem* appointed by the court and the court observes: "Now under the rule declared in the *Swearengen* case that nothing shall be intended to be out of the jurisdiction of a superior court, or court of general jurisdiction but that which appears to be so, the decree in question will have to be sustained. The record contains nothing whatever tending to show that the county court in which the decree was rendered had no jurisdiction."<sup>72</sup>

For instances in which foreign judgments, that were silent upon the question of service or jurisdiction, have been sustained when attacked collaterally, see *Horton v. Critchfield*, 18 Ill. 133; *Dunbar v. Hallowell et al.*, 34 Ill. 168. See *Tucker v. People*, 122 Ill. 583, and *Forrest v. Frey*, 218 Ill. 165, for successful collateral attack upon foreign decrees of divorce.

#### EXCEPTIONS TO RULE—JURISDICTIONAL FACTS

Jurisdictional facts cannot be raised by presumption. In *Commissioners v. Harper*, 38 Ill. 103 Af., the statute required written notice to be given of the meeting of the commissioners to hear reasons for and against the lay-

<sup>72</sup>—*Dunham v. The People ex rel.*, 67 Ill. 414 (Af.); *Mix v. The People ex rel.*, 86 Ill. 312 (Af.); *People ex rel. v. Givens et al.*, 123 Ill. 352 (R. R.); *People ex rel. v. Keener et al.*, 194 Ill. 16 (R. R.);

*Hurd v. The People ex rel.*, 221 Ill. 398 (Af.); *People ex rel. v. Hulin*, 237 Ill. 122 (Af.); *Carrington v. The People ex rel.*, 195 Ill. 484 (Af.); *Taylor v. The People ex rel.*, 2 Gil. 349 (Af.).

ing out of the highway. The record did not show that proper notice was given, and the court observes: "It is all important to land owners, whose property is about to be taken for public use, that they should have the notice required by law, of the proceeding for that purpose, so that they may make objections, and have an opportunity to protect their rights. This notice goes to the jurisdiction of the commissioners, and we cannot presume a jurisdictional fact. Such facts being established, the court is allowed to presume other facts to sustain jurisdiction, but not the jurisdiction itself."

In *C. C. C. & St. L. Ry. Co. v. Randle*, 183 Ill. 364 Af., an application for judgment for delinquent taxes, the objector claimed that the town had adopted the provisions of statute called "labor system." To prove the adoption of the town "labor system," the objector introduced a record, which recited that "at a special meeting held in the town of Irving, etc., in Dr. Hobson's office, on the 28th day of August, 1883, after legal notice was given, the meeting was called to order." The statute required a petition signed by twenty-five persons to be filed with the clerk in order to authorize the calling of a meeting. The court says: "The filing of the petition and the giving of the statutory notice were jurisdictional facts necessary to be proved. They cannot be *presumed*."

Mandamus against the Commissioners of Highways to compel them to levy a special assessment to pay four installments of a special assessment against the Town of Joliet for benefits accruing to highway within the district.

The prayer of the petition for mandamus was granted. The lower court was reversed upon the condition of the record of the county court that confirmed the assessment roll. The court observes: "The order, however, of July 29, 1904, confirming the assessment roll as to benefits by the county court does not recite any jurisdictional facts, and, as *no notice* of any kind is found in the record in-

dicating that any notice was served on the appellants, the jurisdiction of the county court to enter such order does not appear upon the *face* of the proceedings, hence it can not be *presumed* that the county court had such jurisdiction of appellants as authorized that court to enter a judgment of confirmation on such assessment roll against the Town of Joliet. This being so, the circuit court erred in entering judgment herein in accordance with the prayer of the petition.”<sup>73</sup>

#### MOTIONS

The record proper is referred to as containing the following: Objections in writing, cross-motion of property owner for leave to amend one of his objections, judgment sustaining original motion and over-ruling cross-motion, judgment for the tax. There was no bill of exceptions showing the facts, and the court held that there was nothing to review.<sup>74</sup>

#### INDUSTRIAL BOARD

(Session Laws, 1911, p. 315, and 1913, p. 335.)

*Writ of certiorari* to quash record and proceedings of Industrial Board sued out of circuit court. Petition, return, and order of court are a part of the record proper, sec. 19, par. (h) of the statute.<sup>75</sup>

#### JURY TRIAL WHEN ALLOWED

It has been adjudicated that, in applications for judgment against land for the collection of taxes, and the act

73—Spring Creek Drainage Dis.,  
Appellee v. Commissioners of High-  
ways of the Town of Joliet, 238 Ill.  
521 (R. R.).

74—Mullen v. The People, 138  
Ill. 606 (Af.).

75—Pana, City of Def. in Error  
v. Industrial Board et al., 279 Ill.  
279 (Af.).

in relation to change of venue, the right of trial by jury has no application. And in other statutory proceedings, the right to a trial by jury is strictly confined to the instances where the statute has so prescribed. The rule being that, when facts are investigated, in a manner other than according to the course of the common law, the denial of a jury trial is not an infraction of the organic law.<sup>76</sup>

RECITALS—SUCCESSFUL DIRECT ATTACK UPON FINAL ORDERS  
OF INFERIOR TRIBUNALS—COMMISSIONERS OF HIGHWAYS

In a proceeding for *certiorari*, the statute required written notices to be given of the meeting of the commissioners to hear reasons for and against the laying out of a highway. The record did not show that the proper notice was given. Court says: "It is all important to land owners, whose property is about to be taken for public use, that they should have the notice required by law of the proceeding for that purpose, so that they may make objections, and have an opportunity to protect their rights. This *notice* goes to the *jurisdiction* of the commissioners, and we *cannot presume a jurisdictional fact*. Such facts being established, the court is allowed to presume other facts to sustain the jurisdiction, but not *the jurisdiction itself*."<sup>77</sup>

Again, in a proceeding for *certiorari*, the question was, what is sufficient evidence of the posting of the

76—Ross v. Irving, 14 Ill. 171 (R. R.); Johnson v. Joliet & Ch. R. R. Co., 23 Ill. 202 (Af.); Mix v. The People, 86 Ill. 312 (Af.); Ward v. Farwell et al., 97 Ill. 593 (R. R.); Thomas v. Chicago, City of, 204 Ill. 611 (R. R.); Moody v. Found, Exr., 208 Ill. 78 (Af.).

Rhinehart v. Schuyler et al., 2 Gil. 473 (Af.) is a leading case on right

to sell land to pay taxes under judgment rendered without the intervention of a jury.

77—Commissioners v. Harper, 38 Ill. 103 (Af.).

Harper case is cited in Hamilton v. Commissioners of Highways, 203 Ill. 269 (R. R.). "Notices required to be given are jurisdictional."

notices of a meeting to hear reason for and against. The court answers: "*The Final Order*. We have examined the law carefully and find no provision for the preservation of this notice. We think the full recital in the *Final Order* of a strict performance of the duty, is *sufficient to confer jurisdiction*." Here it was held that the statutory requirement to meet within 30 days was *mandatory*. Record not showing that, the proceeding was void."

This case was affirmed because: "Commissioners did not meet to hear reasons and objections until the thirty-first day (the statute said thirty) after the day on which copies of the petition were posted."<sup>78</sup>

In a proceeding for *certiorari*, a petition was filed asking for the vacation of a road and the laying out of a road. On the back of the petition was the following: "The undersigned commissioners \* \* \* met at commencement of road on the 27th day of March, 1903, ten days' notice of the time and place of said meeting having been given as required by law, to hear reasons for and against the laying out of the road described in the within petition as therein prayed, and having personally examined the route of said road and heard the reasons as were offered for and against laying out of the same, we decided that the prayer should not be granted, which decision was publicly announced."

In quashing the record, it was held: Above record did not recite that reasons for and against *vacating* the said road were heard. It does not state that ten days' notice of the time and place of such meeting by posting notices in five of the most *public places* in the township in the vicinity of the road to be vacated or laid out." Court says: "The fixing of the time and place of the meeting and the posting of the notices provided in Sec. 33, are

78—Shinkle et al. Com'rs v. Magil et al., 58 Ill. 422 (Af.).

jurisdictional, and the record must show that there was a compliance with this section.”<sup>79</sup>

Again, in a proceeding for *certiorari*, the commissioners adjourned the meeting, but no notices of the time and place were posted. The final order, establishing the road, the commissioners say: “We did adjourn said meeting after due notice until the 17th day of Sept., A. D., 1903.” But the court says: “Such recital is a mere conclusion of law. Facts must be stated, from which the court is able to see that this conclusion is true. A *quasi* judicial tribunal of inferior jurisdiction should recite *facts* or preserve the *facts themselves*, upon which its jurisdiction depends. The record must show affirmatively that the notice provided for in the statute, has been given, so that the court may be able to see either from the *facts themselves*, or specific recitals of those facts, that due notice was given. After citing authorities, the court says: “The provisions of the statute upon this subject are mandatory and not directory. (Shinkle et al. v. Magill et al., 58 Ill. 422 (Af.).<sup>80</sup>

FINAL ORDERS OF INFERIOR COURTS—RECITALS—SUCCESSFUL  
COLLATERAL ATTACK

Commissioners of highways, city councils, etc., must recite sufficient facts to show that the preliminary steps, required by the statute to give jurisdiction, have been complied with.

In a decree enjoining commissioners from ordering the opening of a certain highway, the final order omitted any mention of a compliance with the statutory requirement as to posting notices. Held void. Injunction sustained.<sup>81</sup>

79—Troxell v. Dick, 216 Ill. 98 (R. E.).

80—Commissioners of Highways v. Smith, 217 Ill. 250 (Af.).

81—Frizzell et al. v. Rogers, 82 Ill. 109 (Af.).

An objection was made, on a trial for the violation of a city ordinance, because there was no proof that it had been submitted to a vote of the people as required by statute. Court says: "Municipal corporations exercise only delegated and limited powers, and in the absence of express statutory provision to that effect, courts are authorized to indulge in no *presumptions* in favor of the validity of their ordinances."<sup>82</sup>

In a *mandamus* proceeding by the commissioners of highways against the county board to compel said board to appropriate money for the construction of a bridge, the record of the former, which was assailed recited: "The amount of taxes was fixed at forty cents for bridges, and twenty cents for roads; for making and repairing bridges, \$6,000.40; for other purposes \$2,100; total, \$8,100.41. Moved to petition county for aid in building bridges over Wood River; carried."

In order to hold the county liable to contribute toward such a building fund, the statute required that it should appear from the record of the commissioners: That it was necessary to repair or construct; that the whole expense of the work would be an unreasonable burden upon the town, and that the cost of the same would be more than could be raised in one year by ordinary taxation. The supreme court in sustaining the lower court in its refusal to allow these facts to be shown by parol observes: "The imperfect record of the determination and action of the commissioners could not thus be cured and aided by parol. Considerations of the gravest character require us to hold, that where the law has required a record to be kept of corporate action by any of the agencies of the state, the record alone can be resorted to to establish such action, in all collateral proceedings."<sup>83</sup>

<sup>82</sup>—*Schott v. People*, 89 Ill. 195 (R. R.).

<sup>83</sup>—*People ex rel. v. Madison, County of*, 125 Ill. 334 (Af.) and

On complaint before a justice of the peace for obstructing a highway, the final order of the commissioners who had attempted to lay out the highway was offered. In holding the final order defective, the supreme court thus observes:

"When the sole reliance to establish a road is placed on the final order, the sufficiency of such order necessarily depends upon the recitals and orders contained in the same. Although the rule in this state has been that in the matter of laying out \* \* \* roads the presumptions are all in favor of the regularity and validity of the various steps and proceedings that are antecedent and preliminary to the entry of the order \* \* \* but subject to rebuttal \* \* \* yet if the recitals and orders in the final order show the lack of any essential element, and such lack is not supplied by the papers relative to the antecedent proceedings \* \* \* such order will be ineffectual to establish the road."<sup>84</sup>

In an action of debt against a party for obstructing a highway, the plaintiff offered in evidence a final order that recited "that they had fixed upon Jan. 16, 1903 at two o'clock P. M., as *the time when* and the site of the road as the place where they would meet to examine the route," etc. In this case the road was one mile long, and it was held that the place named was too indefinite to give the commissioners of highways jurisdiction.<sup>85</sup>

#### UNSUCCESSFUL COLLATERAL ATTACK

In an action of trespass *quare clausum fregit* the defendant introduced the record of a road, which had been laid out by three supervisors, to whom the proceeding had been presented by an appeal from the commissioners

Chaplin v. Highway Com'rs, 129 Ill. 651 (R. R.).

84—Cox v. Com'rs of Highways, 194 Ill. 355 (Af.).

85—Audubon, Town of v. Hand, 231 Ill. 334 (R. R.).



of highways. The objection was made, that the record did not show the posting of the statutory notices and sustained. The supreme court in reversing observes: "There is no question that the appeal was taken in strict conformity to the law, and hence the supervisors had jurisdiction to investigate that question of notice, as well as all other questions involved in the appeal, and they found and determined that due notice had been given—that is conclusive in a collateral action, as this is." <sup>86</sup>

In an action of trespass for removing a fence, in which the defense was, that it was done in opening a highway, the answer was that the assessment of damages was not regular in this: The commissioners gave the appellant (land owner) notice that they would present the certificate to the justice of the peace asking for a jury to assess damages on the 11th of March. The justice dated his docket on the 13th and the appellant claimed that it thus appeared that the certificate for the jury was not in fact presented till the 13th. In meeting this position the supreme court observes: "The final order of the commissioners in establishing the road has the positive statement that the certificate was presented to the justice of the peace on the 11th day of March, 1875 and a jury was selected by the commissioners. This final order is made by the statute *prima facie* evidence of the regularity of the proceedings. \* \* \* We cannot accept the mere date of the docket entry as rebutting the evidence of the presentation of the certificate on the 11th of March." <sup>87</sup>

In a bill for an injunction against the highway commissioners alleging that appellant was the owner of the land and that there was no highway in the *locus in quo*, the question was whether the appellant had executed a release. The court refers to section 92, Road Law (R. S. 1874, p. 927) and says: "By this statute the final

<sup>86</sup>—Wells et al. v. Hicks, 27 Ill. 343 (R. R.).

<sup>87</sup>—Hankins v. Calloway, 88 Ill. 155 (Af.).

order of the commissioners or supervisors who laid out the road is made *prima facie* evidence of the regularity of the proceedings, and that all antecedent provisions of the statute have been complied with."

This final order showed that Samuel Trotter (appellant) was the owner of the land at the time the commissioners acted upon the petition to lay out the road, and that he had released his damages.<sup>88</sup>

#### RECITALS IN ORDINANCES—SUSTAINED ON DIRECT ATTACK

The evidentiary force of recitals in an ordinance authorizing a special assessment was considered on an appeal from a confirmation judgment. The ordinance recited: "Whereas, the commissioners have submitted to the corporate authorities of the town of West Chicago a petition of the owners of a majority of the land fronting on said improvement, duly verified by their engineer; and whereas, the corporate authorities of the town of West Chicago have found that said petition contains the signatures of the owners of a majority of the land fronting on said Douglas Boulevard: Now, therefore, be it ordained," etc.

In considering the force and effect of the above recital the court observes: "This recitation we think properly receivable in evidence as *prima facie* proof of the facts recited. The corporate authorities of the town were, by the statute, invested with sole power in the premises, and were erected, by the statute, into an official body charged with the duty of acting impartially, in their official capacity, as between the park commissioners and the owners of private property which would be subject to the burden of special assessments in the event the improvement as proposed by the park commissioners should be carried into completion. The official

<sup>88</sup>—Trotter v. Barrett et al., 164

Ill. 262 (Af.).

duty first devolving upon the corporate authorities was to ascertain whether the owners of a majority of the land fronting on the proposed improvement had petitioned for the improvement. They discharged that duty."

In this case the authority of the corporation to act was contingent upon a petition being presented signed by a certain definite number of property owners, and the position taken by the court is: If the ordinance shows by recital that the petition signed by the property owners was examined by the corporate body to which it was addressed and found to contain the statutory number of petitioners, jurisdiction and power to act, in the absence of counter vailing proof, is thereby conferred upon the court.<sup>89</sup>

This case should be carefully distinguished from *Thorn v. West Chicago Park Com'r*, 130 Ill. 594, where the commissioners introduced proof on their own motion to support the finding as to the statutory number of petitioners. It thus became a question of fact whether the petition did contain the requisite number of names.

#### JURISDICTION OF SUBJECT MATTER—SUCCESSFUL COLLATERAL ATTACK

In all statutory proceedings, or those not according to the course of the common law, or where no personal notice is given to the parties ultimately to be affected, the petition, that is to awaken the action of the court, must contain all the facts required by the statute to appear therein. The averments of fact stand in the place of and are analogous to a summons and the return thereon of the sheriff, in common law cases; hence the

<sup>89</sup>—*Cummings et al. v. West Chicago Park Com'rs*, 181 Ill. 136 (Af.).

See *McManus et al. v. People ex*

*rel.*, 183 Ill. 391 (Af.), where *Cummings et al. v. West Chicago Park Com'rs* is cited on collateral attack.

strictness with which they must be scrutinized when viewed collaterally. This is specially true in testing collaterally proceedings by guardians to sell the land of their wards, proceedings for the adoption of children and the condemnation of land for the public benefit.

It is important to observe, that facts, as contradistinguished from conclusions, must be stated. The petition must be subject to the same test that bills in chancery are upon demurrer. The rule in chancery is, that the "bill must contain sufficient matters of fact *per se* to maintain the case." This point can be illustrated by reference to a bill in chancery, where the allegation was: "Complainants are advised and believe, and therefore charge the fact to be, that no legal and sufficient notice of the application for confirmation of said assessment was given." This was held to be not a statement of fact but a conclusion of law. So an allegation, in a bill seeking to have an instrument declared to be a mortgage, that a certain transaction was a mortgage, is not a statement of fact but a conclusion of the pleader.

**Rule:** The rule for testing statutory petitions, when assailed collaterally, is: If all the facts, required by the statute are not inserted in the petition that is designed to awaken the action of the court, then the record assailed must be treated as void, unless the findings in the decree include these facts, or raise necessary presumptions of omitted facts having been proved on the hearing.

In an action of trespass for causing the imprisonment of a man and his wife, the latter of whom was acting as administratrix of her deceased husband's estate, the arrest and imprisonment being under an order of the county court, made in the exercise of a special statutory power, the record assailed lacked an averment of fact, without which the court could not act, and was therefore void. The county court (probate side) was assuming to exercise power conferred by statute, and its record not showing affirmatively that it had jurisdiction of the

subject matter, no presumptions, when it was assailed collaterally could be indulged.<sup>90</sup>

In an action upon an administrator's bond, one question was: Whether the person bringing the suit was in fact an administrator *de bonis non*. To show that he was, the record of the probate court was introduced which showed a petition, asking that the former administratrix be cited in, to show cause why she had neglected to pay a certain claim, when the estate was solvent. On this petition the court removed the administratrix. It was held that there was no averment of fact in the petition that warranted the court removing the administratrix.<sup>91</sup>

Again a decree of the probate court removing an executor in response to a petition and citation that directed him to appear and present his accounts for settlement, was held void.<sup>92</sup>

Again letters of administration were taken out upon the estate of one supposed to be dead. His estate was distributed under a decree of court by the master in chancery. In an action against the sureties on the bond of the master, an attack was made upon the decree of the probate court appointing an administrator and sustained. To the point that jurisdiction depended upon the facts set out in the application, the supreme court replied: "It is a fatal error to suppose the power to decide in any case rests solely upon the averments in the pleading."<sup>93</sup>

In an action of ejectment, a condemnation record was assailed. In reference to the necessity of the statutory averments in the petition the court observes: "To put

90—Johnson v. Von Kettler, 84 Ill. 315 (Af.).

91—Munroe v. People for use, 102 Ill. 406 (R. Dis.). See Wand-schneider v. Id., 282 Ill. 286.

92—Hanifan v. Needles, 108 Ill. 403 (Af.).

93—Thomas et al. v. The People for use, 107 Ill. 517 (Af.). See Rice et al. v. Travis, 216 Ill. 249 (R. R.).

the court in motion, and give it jurisdiction in condemnation proceedings, a petition is, in general, necessary, and must be in conformity with the statute granting the right of condemnation. It should set forth, by appropriate averments, all such facts as are necessary to authorize the tribunal to act. \* \* \* We are constrained to hold that the court acted without jurisdiction, and that its judgment was unauthorized and void. In the exercise of special statutory jurisdiction, the court or judge exercising it may be regarded as an inferior tribunal, and possessing no power not specially given by the statute, and therefore, irregularities in the proceeding may be taken advantage of collaterally."<sup>94</sup>

In a partition proceeding, a decree of adoption was successfully assailed. The court observes: "Not only does the petition fail to state that the mother consented to the adoption, or that she deserted the child for one year next preceding the application, but the decree of adoption also fails to find that the desertion was for the space of one year next preceding such application."<sup>95</sup>

#### JURISDICTION OF SUBJECT MATTER—UNSUCCESSFUL COLLATERAL ATTACK

In an action of ejectment an attack was made upon an administrator's petition to sell land to pay debts which averred:

94—Chicago and Northwestern Railway Co. v. Galt, 133 Ill. 657 (Af.).

95—Watts v. Dull et al., 184 Ill. 86 (Af.).

See Kennedy v. Borah, 226 Ill. 243 (Af.), where the decree of adoption was sustained.

What is meant by jurisdiction? In O'Brien v. People, 216 Ill. 354, it is said: "Jurisdiction of the particular matter does not mean simply

jurisdiction of the particular case then occupying the attention of the court, but the jurisdiction of the class of cases to which the particular case belongs." Cited from page 363. See also: Franklin Union v. People, 220 Ill. 355 (Af.).

An ordinance of a city was successfully attacked collaterally because the petition which was designed to awaken the action of the city government was not signed by

“That, under and pursuant to his appointment as such administrator, he has proceeded to adjust and settle the affairs of said estate, in manner prescribed by law; that there are no available dues or demands, personal property, effects or assets belonging to said estate, so far as your petitioner has been able to learn, except as heretofore reported. That your petitioner, administrator as aforesaid, finds that there is a large balance, to wit, the sum of \$225, or thereabouts, still standing against said estate, and which balance, by the order and allowance of said county court, ought to be paid, but which your petitioner is entirely unable to do, for want of property or assets subject to his control.”

This petition was assailed for the reasons: That it did not show that the personal property had been applied toward the payment of the debts; that there was no averment that the personal property was insufficient to pay the just claims, nor that a just and true account of the personal property had been made prior to obtaining an order of sale. The language of the supreme court in sustaining the petition is: “The petition stated enough to require the court to act in the premises,—to set it in motion, and that was sufficient to give the court jurisdiction, and whatever was done under it, was not in the exercise of a usurped power, but of one conferred by law, and although the court may have exercised that power erroneously, its orders and decisions are binding till reversed.”<sup>96</sup>

A decree adopting a minor was assailed in a parti-

any person authorized to sign it. *People ex rel., Appellee v. Chicago, Burlington & Quincy Railroad Co.*, 231 Ill. 463 (Af.).

See *Kennedy v. Borah*, 226 Ill. 243 (Af.). *Watts v. Dull* is cited and the decree of adoption is sustained.

96—Iverson et al. v. Loberg, 26

Ill. 179 (Af.) and the following: *Stow et al. v. Kimball et al.*, 28 Ill. 93 (Af.); *Goudy et al. v. Hall*, 36 Ill. 313 (Af.); *Moore et ux. v. Neil et al.*, 39 Ill. 256 (Af.); *Moffitt et al. v. Moffitt*, 69 Ill. 641 (Af.); *Bostwick et al. v. Skinner et al.*, 80 Ill. 147 (Af.).

tion proceeding. The petition did not state the consent of the father, or his death or that he had abandoned the child. The petition did state that the mother consented and requested that the petition be granted. The record showed that the mother appeared upon the hearing and signified her willingness by signing a written consent. The court held that the omitted averments were not fatal on collateral attack, "the statute only requires, as a jurisdictional fact, that the parent be named who has the actual custody and guardianship of the child, and that it be shown that that person consents to the adoption." 97

A petition in an action to condemn land for a right of way was assailed in an action of trespass. The railroad sought to justify by introducing the proceedings under which, it obtained a right of way by condemnation. The lower court held the proceedings inadmissible. The supreme court in reversing thus observes: "The judge before whom that proceeding was had, was exercising a special jurisdiction, conferred upon him by statute, and hence it was necessary to show that it was such a case as authorized him to act,—that the facts existed, or at least were alleged to exist, which gave him jurisdiction of the subject matter. It was sufficient if those facts appeared in the averments of the petition, or in the order of the judge, or indeed in any part of the record. When such an application was presented as required him to act, then he acquired jurisdiction over the subject. He was then properly set to work. When jurisdiction is once shown to have attached, his authority to act, was as complete as is the authority of the circuit court in any matter of which it has jurisdiction, and the intendments and presumptions in favor of the correctness of the action had and judgment pronounced, are as strong in the one case as in the other.

97—*Barnard et al. v. Barnard*, 119 Ill. 92 (R. & A.) and the following: *Flannigan v. Howard et al.*, 200 Ill. 396 (R. R.).



In this case every necessary fact appears in the record to require the tribunal to act,—to give it jurisdiction. It then had a right to adjudge as to all matters within its jurisdiction, and its judgments were conclusive in all collateral proceedings.”<sup>98</sup>

In an action of ejectment a petition, under which a guardian obtained a decree of the circuit court for the sale of his ward's land, was assailed. Every averment of fact required by the statute was in the petition, “except that instead of averring—‘that the guardian has faithfully applied all the personal estate,’ it stated that no personal property of the wards had ever come to his hands.”

In holding that the “court was properly set to work,” this observation is made: “We do not think this departure from the expressions of the statute fatal to the jurisdiction of the court, although it must be admitted that the averment is somewhat equivocal. The meaning of the statute is, that the guardian should have faithfully applied all of the accessible personal estate; and we are disposed to hold that the averment here was equivalent to that; for if there never was any personal estate, that statement must be equally satisfactory.”<sup>99</sup>

In an action of ejectment, a judgment for the sale of land for taxes was assailed. In holding that the informalities in the record were not fatal to the jurisdiction of the court granting leave to sell the land, the supreme court thus observes: “The rule of law is well

98—*Galena and Chicago Union Railroad Co. v. Pound et al.*, 22 Ill. 399 (R. R.) and the following: *Shute v. Chicago & Milwaukee Railroad Co.*, 26 Ill. 435 (Af.); *Chicago, Burlington & Quincy Railroad Co. v. Chamberlain et al.*, 84 Ill. 333 (R. R.); *Townsend v. Chicago and Alton Railroad Co.*, 91 Ill. 545 (Af.).

99—*Young et al. v. Lorain et al.*, 11 Ill. 624 (R. R.). Also the following: *Fitzgibbon et al. v. Lake et al.*, 29 Ill. 165 (Af.); *Mulford et al. v. Stalzenbach et al.*, 46 Ill. 303 (Af.); *Wing et al. v. Dodge et al.*, 80 Ill. 564 (A in Part); *Reid et al. v. Morton*, 119 Ill. 118 (Af.); *Field v. Peoples et al.*, 180 Ill. 376 (R. R.).

settled, that when a judgment is rendered by a court thus possessing jurisdiction, although the judgment may be irregular and erroneous, it is obligatory until reversed.”<sup>1</sup>

A decree of the county court appointing a conservator of a married woman was assailed in an action of ejectment. In holding against the right of recovery by the heirs, the supreme court observes: “A proper petition was filed \* \* \* there was jurisdiction of the person and the subject matter. Whether the court judged correctly in regard to this being the kind or class of property of which a sale should be decreed, or in regard to the necessity of a sale, could not be inquired into in a collateral proceeding. It is not jurisdictional.”<sup>2</sup>

An attack made upon the petition to probate a will failed because the petition contained “all the elements necessary to call the probate court into action.”<sup>3</sup>

#### RECORD PROPER—DRAINAGE

From analogy to a common law record the petition (all that is necessary to set the wheels of the court in motion) notice to parties interested, assessment roll, report of commissioners, objections filed by property owners and orders of court constitute the record proper.

Under a writ of *certiorari*, the record proper in a certain proceeding in a special drainage district was reviewed and quashed because the commissioners were proceeding to enlarge the district without giving *notice* to property owners interested. In support of its ruling, the court observes:

“The jurisdiction is a special statutory one, and can be exercised only in the manner and under the condi-

1—Chestnut v. Marsh, 12 Ill. 173 (R. R.).

2—Gardner v. Maroney, 95 Ill. 552 (Af.).

3—Chicago Title & Trust Co. v. Brown et al., 183 Ill. 42 (R.).

tions prescribed by the statute. Every attempt therefore to grant the petition and organize a district where the prescribed notice has not been given is nugatory and void. In this case it appears upon the face of the *record* that the first publication of the notice in a newspaper published in Tazewell County was on Dec. 23, and the hearing was had on the 10th of the following January, the first publication being only eighteen days instead of twenty days before the day on which the petition was heard. Most certainly, if the provisions of section fifty were applicable at all, as we *think* they clearly were, they not only required publication of *notice*, but its publication for the full period of twenty days, and such publication was essential to the authority of the commissioners to act. As such publication was not made there was a fatal defect of *notice* and a consequent defect of jurisdiction.”<sup>4</sup>

The record proper was reviewed on error. The report of the commissioners, showed that, as a matter of fact, the said commissioners had assessed two-quarters of land, that were not liable to be assessed. This raised a question of fact, that could not be tried upon the record proper, in the absence of a bill of exceptions showing what evidence was heard. The court would presume that the lower court was right in confirming the report.<sup>5</sup>

In a proceeding in the county court to annex land of appellant to a drainage district, a hearing was had on notice. After the appellant had been defaulted, the commissioners presented an assessment roll. Appellant presents objections which were overruled. Motion to submit the case to a jury overruled. There was no exception to these rulings. Court: “The rule is without exception, that error cannot be assigned upon the ruling of the court, during the progress of the trial not ex-

4—Commissioners Drainage Dis. v. Griffin et al., 134 Ill. 330 (Af.).      5—Hosmer v. Hunt Drainage Dis., 135 Ill. 51 (Af.).

cepted to at the time, and properly preserved in a bill of exceptions.”<sup>6</sup>

The Cat Tail Drainage District filed a petition in the county court against the Johnson Creek Levee and Drainage District to recover under the Act of 1913 (Ses. Laws, Sec. 7, p. 274, 1913), “the costs of the construction and maintenance of outlet ditches beyond the boundaries of said districts for the common benefit of both districts.”

An answer and a cross petition were stricken from the files and a demurrer sustained to pleas that were interposed. The court rendered no further order and the defendant appealed. The appeal was dismissed because the statute (section 7) provided that the “practice shall be as in common law cases.” At common law “if appellant had desired the sufficiency of its answer or pleas passed upon, it should have elected to stand by them and refused to, answer further, so that the court might have rendered judgment by default.”<sup>7</sup>

A petition was filed by the commissioners of a drainage district under section 37 (Levee Act, Ses. Laws 1905, p. 280) including an itemized statement showing the money received and expended and asking that the court levy an additional assessment to complete the work already laid out. All necessary parties were brought in by notice and the court found from the evidence that there were not sufficient funds of the district to complete the work and that all damages had been adjusted in the original proceeding. As ordered by the court a new assessment was spread and reported by the commissioners. Objections were filed to the confirmation of the assessment, which the court overruled: The property owners on the same day made a motion in arrest of judgment which the court sustained. The court then

6—Trigger v. Drainage Dis., 193 Ill. 230 (Af.).

7—Cat Tail Drainage Dis., Appel-

lee v. Johnson Creek Levee and Drainage Dis., 275 Ill. 191 (Appeal dis.).

“vacated and set aside the order overruling the objections made by the appellees, further ordering that the objections made by appellees, and each of them, be ‘sustained as to matters of law presented thereby,’ and that the assessment roll as then corrected be confirmed.”

The supreme court reversed the county court saying: “Only those errors which appear on the face of the record, or those matters which should, but do not, appear on the face of the record, can be urged in arrest of judgment. A motion in arrest of judgment is based on the *record proper*, and in considering such a motion the court does not look into the evidence.” This proceeding affords, therefore, a test of what the *record proper* is under the drainage statute, to wit: Petition with statement of moneys received and expended, notice to parties interested, orders of court, assessment roll, objections of land owners, motion to strike, motion in arrest and the final decree.<sup>8</sup>

PARTIES TO THE RECORD WHEN ALLOWED TO TESTIFY, UNDER  
THE RULES OF CHANCERY

The rule with reference to parties to the record in chancery, testifying, is different from the rule at law. Mr. Justice Caton (*Dyer v. Martin et al.*) says:

“In a court of chancery a witness is not necessarily incompetent because he is a party to the record. Here the enquiry is not so much whether the name of the witness appears upon the record, as whether he is in fact swearing to promote his own interest.”

In this case the interest of the party called preponderated in favor of the party calling him and he was held incompetent.<sup>9</sup>

8—Fountain Head Drainage Dis.  
v. Wright et al., 228 Ill. 208 (R.  
R.).

9—*Dyer v. Martin et al.*, 4 Scam.  
146 (R. R.).

## PARTIES TO THE RECORD TESTIFYING UNDER THE STATUTE

In 1861 the legislature of Illinois (Session Laws, p. 71) passed an act which provided that one party to the record, upon filing an affidavit embodying certain facts, might call upon the opposite party to testify as a witness. The title of the statute was: "An act to dispense with bills of discovery in certain cases."

The purpose of this statute, as finally held by the supreme court, was to allow parties to the record who were incompetent at common law, to testify. Mr. Justice Lawrence, after reviewing the former decisions of the court, says: "Its object was to remove the common law disqualification arising from being a *party to the record* and to authorize one party to call the other to testify against his own interest. But it certainly was never intended to remove the common law disqualifications arising from *the interest of the witness in the result of the suit*, when called to testify in behalf of that interest and without the consent of the person against whom he might be called. There is nothing in the act indicating an intention to make such a radical change in the common law." <sup>10</sup>

## PARTIES DISQUALIFIED AT COMMON LAW, PERMITTED UNDER THE STATUTE TO TESTIFY

A statute enacted in 1867 provided that no person should be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime.

There are numerous exceptions. The principal one is: When the representative of a deceased person sues or defends, a party to the record or one interested in the event of the suit is disqualified from testifying.<sup>11</sup>

10—Brown v. Hurd et al., 41 Ill.  
121 (Af.).

11—Session Laws 1867, p. 183.

## CHAPTER XIII

### NOTICE—CONSTITUTIONAL RIGHT OF TAX PAYER

The taxpayer has a constitutional right to notice of any proceeding designed to divest him of his land. The leading English case is *Rex v. Croke*, 1 Cowper 26.

Definition: "Actual notice and a knowledge of such facts as would necessarily lead a person acting in good faith to actual notice are one and the same thing. A party cannot be permitted wilfully to shut his eyes to what lies in his path, and then complain that he did not see." *White, Sr. v. Kibby*, 42 Ill. 510, Lawrence Judge (Af.).

*Eddy v. The People ex rel.*, 15 Ill. 386. Order reversed.

Here a conservator had been appointed over the estate of a lunatic.

Point and holding of court: "The statute provides that whenever a lunatic has an estate, the judge of the circuit court of the county in which such lunatic lives, shall, on the application of any creditor or relative of the lunatic, order a jury to be summoned to inquire whether such person be a lunatic, and if the jury shall so find, the judge shall appoint a conservator, etc.

"The statute is silent upon the subject of notice, and the question is, whether it is regular to proceed without notice to the supposed lunatic. We are clearly of the opinion that upon the general principles of law, the supposed lunatic is entitled to reasonable notice.

\* \* \* It is said that in this case the supposed lunatic did have notice, and actually appeared by counsel.

\* \* \* If notice was given, the record should show it affirmatively. How is it possible upon this writ of error

for the plaintiff to show the *negative*, and prove that he had no notice?"

Clark v. Lewis, 35 Ill. 417 (Af.).

This was a replevin case for a horse. A horse of the plaintiff in replevin had been driven to the pound by two little girls; received by the pound master, advertised for sale on *July 27th*, and sold on *August 4th, 1863*. The ordinance required not less than *ten days'* notice of the sale. The court cite the case of *Rex v. Croke*, 1 Cow. 26, and observe, in holding the sale *void*: "In all (quoting from page 420) summary proceedings to divest the party of title to his property, the law authorizing the proceeding must be strictly pursued, or the whole transaction will be void. In all cases where the party whose rights are to be affected has no actual notice, and cannot be heard in support of his rights, it is no more than reasonable and proper that a strict compliance with the requirements of the law, under which the proceeding is conducted, shall be regarded as essentially necessary to the divesture of title."

Nashville, City of v. Weiser et al., 54 Ill. 245 (Af.).

Here taxpayer did not receive constitutional notice. An assessment had been made and the city charter required that the city fix upon a time and place where objections could be heard and give notice by publication. The city gave notice but failed to attend at the time and place so that objections could be heard. There was a failure to give notice in the corporation newspaper, and the assessor stated that he did not inform the tax payers, when he assessed their property of the value he placed upon it. On the constitutional right of notice the court observes: "By the exercising of the taxing power, the citizen is deprived of his property, and it is manifestly his right to have his property so assessed that it shall bear no more than his proportionate share of the burden. He also has a right to be informed of the value placed upon it by the assessor. \* \* \* All persons have a



right to be heard before they can be justly deprived of their property, and the assessment and collection of a tax deprive the individual as effectually as can be done in any other mode, or for any other purpose; and before it can be legally done, he should have an opportunity of being heard."

Com'rs of Drainage Dis. v. Griffin et al., 134 Ill. 330 (Af.).

Certiorari proceeding. Section 42 of Drainage Act of 1885 vested the commissioners with power to enlarge boundaries of their district but failed to prescribe the mode of procedure and the notice that should be given to the owners of land sought to be annexed. In holding that although the statute was silent as to notice, notice to land owner must be given the court observes: "Said section, in vesting the drainage commissioners with power to enlarge the boundaries of their district, fails to prescribe the mode of procedure or the notice to be given to the owners of the land sought to be annexed. We cannot for a moment entertain the view that it was the intention of the legislature to leave these matters to mere discretion of the commissioners. \* \* \* It is only in accordance with the plainest principles of natural justice that the land owners should have a right to be heard upon the question whether a proper petition has been presented, and whether their lands are involved in the same system of drainage, etc."

The court holds that the same notice must be given as is required in original organizations and that the matter of notice is mandatory and jurisdictional.

Carney v. The People, 210 Ill. 434 (R. R. ).

An action of debt was brought against William J. Carney under section 230, Revenue Law, to recover an assessment that the board of review had levied against him, of which levy by said board he had no notice. The court held that the declaration was variant from the proof and there was error in not sustaining the motion

in arrest of judgment, etc. But on the question of lack of notice the court observes: "We should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. It has been customary to provide for them as a part of what is due process of law for these cases; and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount, in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard."

People, Appellee v. International Salt Co., 233 Ill. 223 (Af.).

Referring to the Carney case the court observes that it is not necessary for the board of assessors to give notice of an original assessment made by them.

Wabash, St. Louis & Pacific Railway Co. v. Johnson, 108 Ill. 11, is differentiated from the above case in this: The citizen in the latter case had a right to be heard on review before the town board of review.

## CHAPTER XIV

### PUBLIC REVENUE—PROCEEDINGS TO COLLECT

#### INVASION OF COMMON LAW PRINCIPLES OF PRACTICE

**Rule at common law:**<sup>1</sup> A party who asserts the affirmative has "the obligation of proving any fact so asserted: This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof, of which the affirmative is capable."

Greenleaf Evidence, Sec. 74, Chap. 3 (2nd Ed.).

**Statute of 1829.** Gale's Statute (Revised Laws, 571) says: "It shall not be necessary for any purchaser of lands so sold for taxes, to obtain, keep or produce any advertisement of the sale thereof; but his deeds from the auditor of public accounts shall be evidence of the regularity and legality of the sale, until the contrary shall be made to appear."

"Act concerning Public Rev." Ses. Laws, 1838-9. Sec. 43, p. 18.

Following this statute are: Revenue, Chap. 120, section 224, R. S. 1874, page 895; Special Assessment, Session Laws of 1897, section 9, p. 105; Conveyances, Registration of land titles Amendment, Sec. 18, Session Laws 1907, p. 209.

*Fitch et al. v. Pinckard et al.*, 4 Scam. 69 (Af.).

This was ejectment. The plaintiff relied upon a tax proceeding under a city charter; the court held that the

<sup>1</sup>—The principle is referred to in *Williams et al. v. Underhill*, 58 Ill. 137 (R. R.).

city had exceeded its power under the charter, and that the proceeding to collect the tax was void (ordinance under which sale was made said that the deed should be evidence of duties required, etc.). Court says that the corporation had no power to change the law of evidence.

Second. The plaintiff also claimed, under a sale by a sheriff, there was this endorsement upon the writ: "Levied this execution; May 28, 1837 on a certain lot situated on the angle of Second and State Street, in the Town of Alton, and advertised to be sold July 29th, 1837."

Held: That the sale was void on account of the uncertainty of the description.

This statute does not relieve from the necessity of producing judgment and *precept*. *Hinman v. Pope*, 1 Gil. 131. Affirmed.

Facts: Ejectment; plaintiff offered in evidence sheriff's deed dated May 2nd, 1843, under a judgment April term, A. D., 1841 of the circuit court in favor of the State of Illinois against a tract of land for the amount of the taxes for the year 1839; a precept (under the amended section, which repealed so much of section 31, Revenue Act of 1839, as required the clerk of the circuit court to furnish a copy of the collector's report to the sheriff) was offered in evidence. Both instruments were objected to, and the objection sustained. The supreme court sustained the ruling. The supreme court, after citing section 43 of the Revenue Act of 1839 (Session Laws, p. 18, 1839) which makes a deed executed by the sheriff on a sale of land for taxes *prima facie* evidence of certain enumerated facts, observes (*Hinman* held tax deed): "It is (quoting from page 137) evident, that in this section (section 43) there is no express provision dispensing with the production of a judgment and execution." \* \* \*

"No one can doubt, as I conceive, if there was no

judgment against the land, that the sheriff's sale and deed were void. If so, on whom, according to the well established rules of evidence, ought the burden of proving the judgment to rest? Clearly, on the plaintiff. The judgment lies at the foundation of his title, and is as essential to its validity, as the deed itself. When he commences his action against the possessor or owner of the land, he assumes the affirmative, that a judgment has been rendered, and the statute comes to his aid, and points out an easy mode by which he can produce the evidence. The rule of the common law is well settled, that he who affirms the existence of a material fact, must prove it, and the opposite party is seldom, if ever required to prove a negative in the first instance."

The process (precept) was held void because it did not contain any reference to the judgment. It was further held that the legislature by its amendment in 1840 of section 31 only intended to dispense with the "copy of the collector's report but in every other respect, the process must conform to the requirements of section 31."

Graves et al. v. Bruen, Appellee, 1 Gil. 167 (Af.).

This was ejectment. The plaintiff offered an auditor's tax deed to Bruen (plaintiff) dated Jan. 2, 1840.

Land sold Jan. 10th, 1833.

Tax due for year 1832.

The deed had neither been acknowledged nor recorded.

Objection to it overruled, and deed admitted in evidence.

This ruling sustained by the supreme court.

Court: "It is hardly necessary to say that the registry acts do not apply to patents emanating from either the state, or the United States."

The evidence that was offered to show that the land was not properly listed for taxation was held to be loose

and indefinite and calculated to mislead the jury; hence the court below committed no error in excluding it.

*Hinman v. Pope*, 1 Gil. 131, cited as authority in *Atkins v. Hinman*, 2 Gil. 437 (Af.).

*Vance, Plaintiff in Error v. Schuyler et al.*, 1 Gil. 160 (Af.).

Ejectment brought by Schuyler. Sale made under act passed in 1827 and 1829. The auditor's deed bore date Nov. 8th, 1833. The deed recited a sale for taxes of the year 1830. The plaintiff read this deed in evidence; no other evidence in connection with it. The court after referring to the statute and saying that the statute has repealed the rules of strict construction "applied to the exercise of naked powers uncoupled with an interest" observes: "This deed, then, was *prima facie*, sufficient for the plaintiffs, without other evidence connected with it, in relation to the sale."

Further it is held in this case that certain provisions of the statute with reference to depositing copies of the advertisements of the land in various offices, are *directory* not mandatory.

#### SUCCESSFUL ATTACK ON TAX PROCEEDING

*Graves v. Bruen et al.*, 11 Ill. 431 (R. R.).

This was ejectment. Judgment below for plaintiff. A deed from the auditor, under the statute was introduced and relied upon without proving the antecedent steps.

The court says: "It has been decided by this court that an auditor's deed, executed under the provisions of the act (1829) affords *prima facie* evidence of the regularity and validity of the sale, and of the proceedings anterior thereto, and is sufficient unconnected with other proof to entitle a party claiming under it to recover.

According to the principles of the common law, a party claiming title under special proceedings author-

ized by statute, by which the estate of one man may be divested and transferred to another, is bound to prove that all the material requisitions of the statute have been complied with, or he acquires no title.

But the statute of 1829, as this court has held, dispenses with the rule of the common law, and places the burden of proof, in the first instance, on the party controverting the title claimed under the auditor's deed."

Then the court goes on to inquire what the plaintiff would have to established had there been no statute; and further says: "This court decided, in the case of *Rhinehart v. Schuyler*, 2 Gil. 473, that these revenue laws were constitutional; but the decision was put expressly on the ground that a classification of the lands in pursuance of their provisions, was a valuation within the true intent and meaning of the constitution."

Further the court says: "In every point of view, listing was a necessary prerequisite to a valid sale of the land. It was demanded by the soundest principles of the common law, the plainest dictates of justice."

Further court says: "The presumption that the land had been listed for taxation was rebutted by the defendant; and the plaintiff failing to prove affirmatively a legal listing, they were not entitled to recover."

What will be sufficient proof to rebut the presumption of antecedent steps having been taken?

Court says: "The defendant went to the office where the listing was required to be made, and procured all the evidence there to be found relating to the matter; and that evidence fails wholly to show that there was any listing of land."

"A party is not required to make plenary proof of a negative averment. It is enough that he introduces such evidence as, in the absence of all counter testimony, will afford reasonable ground for presuming that the allegation is true; and when this is done, the *onus pro bandi* will be thrown on his adversary."

## PRINCIPLE OF THE COMMON LAW

“It is a settled principle of the common law, that a party, claiming under a summary and extraordinary proceeding, must show that all the indispensable preliminaries to a valid sale, which the law has prescribed, in order to give notice to those interested, and to guard against fraud, have been complied with, or the conveyance will pass no title.” Quoted from *Garrett v. Wiggins*, 1 Scam., page 337.

In an action of ejectment, the plaintiff to recover, relied solely upon a deed executed by the auditor of public accounts, as the property of the defendant for the non-payment of taxes. The court instructed the jury, in the absence of proof to the contrary, the deed was evidence of the regularity and legality of the sale. The supreme court relying upon the above principle reversed the circuit court's holding.

In *Vance v. Schuyler et al.*, 1 Gil. 160, the plaintiff to recover in ejectment introduced a deed which recited a sale of land by the auditor, without any other evidence in connection with it. The supreme court held that an objection to the admission of the deed could not be sustained, because the legislature by acts passed in 1827 and 1829 had made the deed “evidence of the regularity and legality of the sale until the contrary shall be made to appear.”

## STATUTE OF 1874

In 1873 to the statute (Sec. 191, R. 1874, Chap. 120) authorizing judgment against lands for non-payment of taxes, the legislature added the following: “No assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, com-



pleted or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, *not affecting the substantial justice* of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof."

**JURISDICTIONAL—MEANING OF THE TERM, IN STATUTORY PROCEEDINGS, TO COLLECT REVENUE**

Acts, that the artificial body receiving the revenue collected must perform, as a condition precedent to enforcing payment of the tax, as against the tax payer, together with the time and manner of transmitting this information to the county clerk, are called jurisdictional.

• When a statute provides a certain method for a corporation (taxing body) to indicate its need for money, and the amount needed, that particular method must be followed strictly, in order to set in motion the machinery for collecting the tax.

If these acts, that the statute says shall be performed, were not in fact performed, or there is lacking record evidence of their performance, then, on application for judgment against the property on which a tax levy has been imposed, it is proper to say that jurisdiction is lacking. When for any reason, jurisdiction is lacking, the application of the county collector for judgment against the land of the property owner will be denied.

**AMENDMENTS**

Right to amend. When? If steps are taken, which are rendered necessary by the statute, but there is lacking statutory evidence of such steps, then the record may

be amended, under the curative statute. Section 191, Chap. 120, R. S. 1874.

#### BOARD OF TOWN AUDITORS

The supervisor, town clerk and justices of the peace of the town shall constitute a board of auditors; the board consists of no less than three persons.<sup>2</sup> It is the duty of the board to meet at the town clerk's office semi-annually for the purpose of examining and auditing the town accounts. The duties of the board as prescribed by statute are: to "examine the accounts of the supervisor, overseer of the poor and the commissioners of highways of such town, for all moneys received and disbursed by them, and shall also examine and audit all charges and claims against their town, and the compensation of all town officers except the compensation of supervisors for county services."<sup>3</sup>

The auditing board has no power to levy taxes; it can not "indicate its need for money," this can only be done by the electors of the town "at the annual town meeting," who in the language of the statute<sup>4</sup> have the power "to direct the raising of money by taxation for the following purposes:

"First. For constructing or repairing roads, bridges or causeways within the town, to the extent allowed by law.

"Second. For the prosecution or defense of suits by or against the town, or in which it is interested.

"Third. For any other purposes required by law.

"Fourth. For the purpose of building or repairing bridges or causeways in any other town in the same county or in another county."<sup>5</sup>

2—Art. 13, Sec. 1, R. S. 1874.

3—Sec. 4 *idem* Art.

4—Art. 4, Sec. 3, Chap. 130, R. S. 1874. Peoria, Decatur and Evans-

ville Railway Co. v. People *ex rel.*, 141 Ill. 483 (R.).

5—See Robinson, Appellee v. McKenney, 239 Ill. 343 (decree *Af.*),

There are two classes of adjudged cases that clearly point out and define the duties of the auditing board. Certain judgments had been obtained against the Town of Lemont. In town meeting it was "moved by Mr. H. S. Norton, and duly seconded that a tax of \$3,000 be levied for the payment of outstanding judgments against the town." The town clerk certified to the county clerk of Cook County that said sum had been levied at the annual town meeting for the payment of outstanding judgments against the town. The supreme court in sustaining the county court in refusing a judgment of sale on the application of the county collector observes: "The attempt by the town meeting to exercise the powers of the board of auditors was illegal and the tax void." \* \* \* "The electors at the town meeting (p. 368) derive their only power to levy and collect taxes from the provisions of the statute, and any tax levied by them for a purpose not authorized will be void. \* \* \* Neither in express terms nor by inference is any power given to the town meeting to audit and allow and reject claims and charges against the town, but that power is expressly given to the board of auditors."<sup>6</sup>

On an application for judgment against lands and lots reported delinquent by the county collector, a "receiver appeared and objected" that "the sole and only authority for extending the tax was a certificate made by the board of town auditors," who made a certificate of tax for \$600 for the ensuing year as the "entire amount of money required for all town purposes." In reversing the judg-

where the elector's power in town meeting is carefully distinguished from the power of the commissioners of highways in the matter of levying road and bridge taxes.

<sup>6</sup>—*People ex rel. v. Chicago and Alton Railroad Co.*, 193 Ill. 364 (Af.) and *People ex rel. v. id.*, 194

Ill. 51 (Af.); and *Cincinnati, Indianapolis & Western Railway Co. v. People ex rel.*, 207 Ill. 566 (Af.); *People ex rel. Appellant v. C. B. & Q. R. R. Co.*, 248 Ill. 81 (Af.) and *People ex rel., Appellee v. Chicago & Eastern Illinois Railroad Co.*, 249 Ill. 549 (R. R.).

ment of the county court, it is held: "That board had no power to levy this tax. \* \* \* The power to levy taxes for town purposes is by section 3 of article 4, chapter 139, of the Revised Statutes, expressly given to the electors at the annual town meeting."<sup>7</sup>

#### LEVY BY BOARD OF SUPERVISORS

Objection: Resolution of board directed the clerk to extend the amount of 75 cents on each \$100 of valuation for current expenses of the county. Under Sec. 121, Revenue Act, it should have specified sums of money to be raised and purpose for which each sum was required. \* \* \* Held that the designation was too general. That it was not within the power of the county board to levy a tax without reference to the needs of the county.<sup>8</sup>

Under Statute of 1901 Laws, p. 272, a tax was extended by the clerk erroneously by following "the valuation as fixed by the state board of equalization."<sup>9</sup>

A special meeting of the board was called to levy a tax that had been voted. The supervisors met on Jan. 7, 1905 and a resolution was offered for the extension of an additional tax levy of 42 cents on the \$100.

The record failed to show that the resolution was adopted. Held error to rendered judgment for the tax thus extended.<sup>10</sup>

Section 121, Ch. 120, R. S. 1874—

7—Hopkins, Receiver v. People ex rel., 174 Ill. 416 (R. R.).

8—Cincinnati, Indianapolis & Western Ry. Co. v. People ex rel., 213 Ill. 197 (Af. only in Part); Idem v. People ex rel., 213 Ill. 558 (R. R.); People ex rel. v. Cin., Ind. & Western Ry. Co., 213 Ill. 503 (Af.); followed in C. B. & Q. R. R. Co. v. P., 213 Ill. 458 (R. R.); C. & E. I. R. R. Co. v. The People ex rel., 214 Ill. 23 (R. R.).

9—Clev., Cin., Chi. & St. Louis Ry. Co. v. People ex rel., 223 Ill. 17 (R. R.).

10—Chi. & Eastern Ill. R. Co. v. People ex rel., 218 Ill. 463 (R. R.).

Held also that this tax levy could be levied by the board immediately after the election and not wait till the regular meeting in September. Supra.

"The county board—shall, annually, at the September session determine the amount of all taxes to be raised for county purposes \* \* \* the amount for each purpose shall be stated separately."

Chicago, Burlington and Quincy Railroad Co. v. People, ex rel., 213 Ill. 458 (R. R.).

On the point that "taxes to be raised for county purposes were not stated separately," the court observes: "The provisions of the statute in question are substantially the same as similar statutes which have (207 Ill. 566; 194 id. 51; 193 id. 364) been construed, and to say that a levy made in gross amount for all county purposes was valid, would be equivalent to giving no effect to that provision of the statute requiring the amount for each purpose to be stated separately.

\* \* \* Taxes raised for county purposes include many different things, and these various amounts and purposes can be ascertained by the county board the same as they are ascertained by other taxing bodies." <sup>11</sup>

## LEVY BY A CITY OR VILLAGE

### APPROPRIATION ORDINANCE

The point was made on application for judgment for delinquent taxes that the appropriation ordinance contained this item: "Interest on rolling mill bonds, and principal on 10 bonds, \$15,300." \* \* \*

Court: "This item, it is insisted, being for the benefit of a purely private manufacturing corporation, has

11—People ex rel. v. C., Ind. & W. Ry. Co., 213 Ill. 503 (Af.) cites and follows 213 Ill. 458; C. Ind. & W. R. Co. v. People ex rel., 213 Ill. 558 (R. R.); P. v. C. I. & W. Ry. Co., 224 Ill. 523 (Af.); C. I. & W. Ry. Co. v. People, 213 Ill. 197 (Af. in Part); People ex rel. v. C. C. C.

& St. L. R. Co., 231 Ill. 209 (R. R.); People ex rel. v. C. V. & C. R. Co., 237 Ill. 312 (R. R.); People ex rel. v. C. V. & C. R. Co., 243 Ill. 217 (R. in Part); People ex rel. v. Tol., St. L. & W. R. Co., Appellant, 231 Ill. 498 (R. R.).

no authority of law to sustain it. To this the counsel for the people reply that the record fails to show that this levy is of the character objected. We cannot concur in this view. It devolves upon the people to show that the tax sought to be collected has the sanction of the law to support it.”<sup>12</sup>

The point was made that the city did not pass an appropriation ordinance “prior to the passage of the ordinance which purported to assess and levy the tax.

Court: “Section 89 provides for an appropriation ordinance prior to the passage of the ordinance which purports to assess and levy the tax. Section 111 provides for an ordinance levying the amount of such appropriation upon the property subject to taxation. In this case the only ordinance was that passed on June 20, 1884, and the question is, whether the appropriation and the tax levy can both be embodied in the same ordinance. The law contemplates the passage of two separate ordinances at different times.”<sup>13</sup>

The statute requiring the annual appropriation ordinance to be passed within the first quarter of the fiscal year is mandatory.

Reason: “The requirement that the annual appropriation bill shall be passed within the first quarter of the fiscal year being in the interest of the tax payer, and being the prerequisite to the passage of a levy ordinance required under the grant of power to the municipal corporation to levy taxes, a failure to comply with it affects the substantial justice of the tax.”<sup>14</sup>

The appropriation ordinance is not confined to funds that are raised by taxation but must include funds received from miscellaneous sources.<sup>15</sup>

12—*English v. People*, 96 Ill. 566 (R. R.).

13—*People ex rel. v. P. D. & E. R. Co.*, 116 Ill. 410 (Af.).

14—*People ex rel., Appellant v. McElroy et al.*, 248 Ill. 574 (Af.).

15—*People ex rel., Appellee v. Sergel*, 269 Ill. 619 (R.).

## ORDINANCES

## SUCCESSFUL DIRECT ATTACK

The constitution, article 9, section 12, limits tax by municipal corporations et al. to five per cent.

"All negative or prohibitory clauses of this character found in a constitution execute themselves." The objection was that items in the appropriation ordinance, payment on general bonded debt, interest on temporary loans, etc., were void as within the constitutional limitation. So held. *Edwards case*, 84 Ill. 626, reviewed and adhered to.<sup>16</sup>

## UNSUCCESSFUL DIRECT ATTACK—LEVY ORDINANCE

Unnecessary to publish the tax levy ordinance.<sup>17</sup>

## SUCCESSFUL DIRECT ATTACK

Sec. 1, Art. 8, Chap. 24, R. S. 1874, requires the passage of a levy ordinance on or before the second Tuesday in September in each year and the filing a certified copy of such ordinance with the county clerk.

The village clerk deposited with the county clerk the original appropriation ordinance, with no certificate attached. Nothing that purported to be a copy of the levy ordinance was filed. Collection of the tax enjoined.

Court: "In the absence of a certified copy of the ordinance levying the tax the county clerk was without authority to make the extension. The certificate of the levy of the tax is jurisdictional."<sup>18</sup>

16—*Law et al. v. People ex rel.*, 87 Ill. 385 (R. R.).

17—*Mix v. People ex rel.*, 106 Ill. 425 (Af.).

18—*Russellville, Village of v. Purdy et al.*, 206 Ill. 142 (decree affirmed).

**ATTACK WITHSTOOD BY PRESUMPTIONS—APPROPRIATION AND  
LEVY ORDINANCES**

“At the hearing of the objections appellant offered in evidence the annual appropriation ordinance and the annual tax levy ordinance of the city, and proof of the dates on which they were respectively filed with the county clerk, but offered no evidence to show the dates at which said ordinances were *passed by* the city. The times at which the several ordinances were filed with the county clerk do not fix the dates of their passage, or even tend to prove such dates. The presumption is that the ordinances were both passed in conformity to law, and that the city tax was properly levied and extended.”<sup>19</sup>

**TAX LEVY ORDINANCE CURED BY SECTION 191, CHAP. 120,  
R. S. 1874**

Tax levy ordinance did not specify in detail the purposes for which the appropriations were made and the amounts appropriated for each purpose. \* \* \* The appropriation ordinance, however, specified the objects and purposes for which the appropriations were made.

Court: “It (tax levy ordinance), however, in express terms made reference to the annual appropriation ordinance that had been passed by the city council, and to the record thereof, and thereby made said appropriation ordinance a part and parcel of the tax levying ordinance, and there can be no question but that said appropriation ordinance is sufficiently specific.” \* \* \*

19—Keokuk Bridge Co. v. People ex rel., 161 Ill. 132 (R. R.).

Reversed because a judgment had been rendered for the sale of a part of the bridge that was in Illinois to pay taxes illegally assessed upon the

value of 850.82 feet of its bridge that is located in Iowa; and followed in Shriver v. McGregor et al., 224 Ill. 397 (Af.). Suit in equity to enjoin. Bill dismissed. Sustained.



If this is an error it does not affect the substantial justice of the tax and would be cured by section 191 of the Amended Revenue Law 1873.<sup>20</sup>

In differentiating *C. P. & St. L. Ry. Co. v. People ex rel.* 225 Ill. 463, *R. & A.* from *People v. P. D. & E. R. Co.*, 116 Ill. 410, the court observes: "The chief purpose of the statutory provision requiring the purposes to be specified in detail is to apprise the tax payers, and all others interested as to what the public funds are to be used for, and the ordinance under discussion performs this function with reasonable certainty, or at least makes the objects for which the money was to be spent readily ascertainable from the figures given in the ordinance itself." Here the tax levy ordinance did not "specify in detail the objects and purposes for which the tax was levied," but referred to the appropriation ordinance for the information.

It is no objection to a tax levy ordinance that it is less than the appropriation ordinance "where the purpose for which the levy is made is the same for which the appropriation is made."

The law is settled that a county clerk has no authority to act at all unless the tax levy is certified to him by the proper clerk.<sup>24</sup>

#### UNSUCCESSFUL DIRECT ATTACK UPON TAX LEVY ORDINANCE

The appropriation ordinance specified objects and purposes for which several amounts were appropriated.

20—*Spring Valley Coal Co. v. People*, 157 Ill. 543 (A. & R.).

An objection to a tax levied for a library fund (*Laws* 1891, p. 160) was sustained following *Cairo, City of v. Campbell*, 116 Ill. 305; *C. & E. I. R. R. Co. v. People*, 218 Ill. 463 (R. & A.); *Chicago, Peoria & St. Louis R. Co. v. People ex rel.*, 225 Ill. 463 (R. & A.).

24—*Cin., Ind. and West. Ry. Co.*

*v. People ex rel.*, 213 Ill. 197 (Af.); also *People ex rel.*, *Appellant v. Cairo, Vincennes & C. R. Co.*, 248 Ill. 36 (Af.). The law is settled that a county clerk has no authority to extend a tax for "road and bridge purposes" without a copy of the commissioners' certificate of the rate agreed upon to be levied, made by the town clerk.

\* \* \* The tax levy ordinance did not specify but referred to the appropriation ordinance thus making it a part of the latter.<sup>25</sup>

Court: "The tax levy ordinance should have specified in detail each object and purpose for which the tax was levied. As, however, it in express terms referred to the appropriation ordinance, which ordinance contained such information in detail, the tax levy was not void by reason of such omission in the tax levying ordinance, as the omission from the tax levying ordinance of such detailed information did not affect the substantial justice of the tax, and the defect was cured by Section 191 of the Revenue Act." <sup>26</sup>

#### APPROPRIATION ORDINANCE

Improvement bonds issued to raise money to pay for an improvement by general taxation not to be included in determining whether appropriations exceed the statutory limit of 2%.<sup>27</sup>

#### SUCCESSFUL DIRECT ATTACK

The appropriation and levy ordinance can not be embodied in the same ordinance.<sup>28</sup> Citing 113 Ill. 256.

Sec. 3, art. 5, City and Village Act appropriation ordinance not in force till ten days after publication.<sup>30</sup>

One point of objection was: that 851 feet of appellant's bridge situated in Iowa was valued and assessed in Illinois.

25—Spring Valley Coal Co. v. People ex rel., 157 Ill. 543 (Af.).

26—Chicago & Eastern Illinois R. Co. v. People ex rel., 218 Ill. 468 (Af.).

27—Wabash Railroad Co. v. People ex rel., 187 Ill. 289 (R. R.).  
Unsuccessful direct attack on App. and levy ord. Mix v. People, 106 Ill. 425 (Af.).

28—People ex rel. v. Peoria, Decatur & Evansville R. Co., 116 Ill. 410 (Af.).

30—People ex rel. v. Florville, 207 Ill. 79 (Af.); People ex rel., Appellee v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 281 Ill. 152 (R. R.).

Held error to overrule the objection. \* \* \*

Held also that the court erred in allowing an amendment of the description of the property assessed.

Syllabus: "An assessment of a portion of a bridge between two states should not be amended by inserting the number of feet actually within the taxing state, after the words "to the state line," where it appears that the valuation returned was placed upon a greater length of the bridge under a mistaken belief of the assessor as to the location of the state line."

Objection: The State Board of Equalization based its assessment on capital stock \$1,100,000 when the whole capital stock of the company was only \$1,000,000.

Held that this was immaterial as the indebtedness of the company was \$1,693,333.33 and the shares of its capital stock had no market value. \* \* \*

Court: "If shares of stock in a corporation are worthless because of its debts, the creditors take the place of the stockholders, and if these debts have value, it is presumptively because there is an equal amount in value of corporate property from which payment can be made."

By way of amendment the court allowed the sign \$ to be placed behind 3500 held no error.

Presumption: The dates when the tax and appropriation ordinance were passed did not appear. Held presumption that they were passed in conformity with law.<sup>31</sup>

**DRAINAGE COMMISSIONER'S CERTIFICATE—SUCCESSFULLY  
ATTACKED**

The commissioner's certificate omitted to state four particulars required by the statute. The court cites Com-

<sup>31</sup>—Keokuk and Hamilton Bridge  
Co. v. The People ex rel., 161 Ill.  
122 (R. R.).

missioners of Highways v. Newell, 80 Ill. 587 (Chancery proceeding, injunction application for), and observes:

"The statute clearly contemplates that the several amounts to be levied for interest, repairs, or to meet a deficiency for accrued interest or for repairs already made, should be stated. The provisions of the statute are intended for the protection of the tax payer, and are mandatory." <sup>32</sup>

#### SUCCESSFUL COLLATERAL ATTACK

Ejectment.—Judgment for defendant. Plaintiff appealed. Defendant claimed under tax deed. \* \* \*

Point made that there had been no appropriation or ordinance passed. Court: "The power given to the city council to levy taxes is with a restriction as to the manner in which the power is to be exercised. \* \* \* The act requires the annual appropriations to be first made within the first quarter of the fiscal year. \* \* \* These requirements of the statute we regard as for the protection of the citizen, and not directory but mandatory." <sup>28</sup>

#### CONSTITUTION

A special statute amending the charter of a city or village is not in contravention of section 22, art. 4, Con. <sup>21</sup>

#### SCHOOL TAX—NO RECOVERY WHEN TAX IS PAID IN ERROR

For an instance where school taxes paid by mistake could not be recovered by the taxpayers see Walser et al. v. Board of Education, 160 Ill. 272, where the court, in

32—People ex rel. v. Glenn et al.,  
207 Ill. 50 (Af.).

28—The Riverside Co. v. Howell,  
113 Ill. 256 (R. R.).

21—Cleveland, Cin., Chi. and St.  
Louis Ry. Co. v. Randle Co. Treas.,  
183 Ill. 364 (Af.).

denying the right to recover the money, observes: "The rule that an illegal and void tax voluntarily paid cannot be recovered from the municipality by the person paying, being settled by the adjudications of this court (see the cases cited in the note 22), it must be held that what cannot be done directly cannot be done by indirection. No right exists in other tax-payers to recover such voluntarily paid tax." <sup>22</sup>

#### TAX LEVIES BY SCHOOL DISTRICTS, OR SCHOOL BOARDS

Appropriation and tax levy ordinance are sufficiently definite which says "educational purposes" and "building purposes."

Legislative amendment. A wrong section given in an act amendatory, the legislative intent being clear, the subject-matter of the act to be amended being expressed in the title of the amendatory act and the section amended being inserted at length therein, does not render the amendment invalid.<sup>23</sup> Any description by which the property can be identified by a surveyor is sufficient.

#### AMENDMENTS—SCHOOL LEVIES—CONDITIONS UNDER WHICH THEY WILL BE ALLOWED

In holding (*Chicago & Northwestern Railway Co. v. People ex rel.*, 200 Ill. 141) that the circuit court *erred* in "permitting the certificates of the commissioners and the consents of the boards of auditors and the assessors to be amended so as to specify certain purposes to which the taxes should apply," the rule to be observed in the allowance of amendments is thus stated:

22—*Elston v. Chicago, City of*, 40 Ill. 514; *Falls v. Cairo, City of*, 58 Ill. 403; *Union Building Ass. v. Chicago, City of*, 61 Ill. 439; *Swanston v. Ijama*, 63 Ill. 165; *C. B. & Q. v. People*; 136 Ill. 660 (Af.); *Walser et al. v. Board of Education*, 160 Ill. 272 (Af.).

23—*Otis v. The People ex rel.*, 190 Ill. 542 (Af.).

“Where the power to levy a tax is conferred by law and is regularly exercised by the proper authorities in substantial conformity to the law, the court, upon proof of such fact may permit the certificate of the levy to be amended on the hearing by changing the official signatures to be substituted for the corporate name and correct other like formal errors. \* \* \*

There must be a valid levy, which is defective in matters merely formal, to authorize an amendment.”<sup>33</sup>

CERTIFICATE OF SCHOOL BOARDS—REQUIRED BY STATUTE—  
JURISDICTIONAL IN ITS NATURE

What is the basis of a valid levy for school taxes? Section 44 of chapter 122 (School Law) R. S. 1874, p. 961, provides that the directors shall annually ascertain \* \* \* how much money must be raised by special tax for school purposes during the ensuing year, and certify and return the same to the township treasurer on or before the first Monday of September. \* \* \* The township treasurer returns the certificates to the county clerk. \* \* \*

To authorize the county clerk to extend a tax on a legal valuation of the property, there must be a certificate containing the statutory elements on file in his office. In a case in which the county clerk extends a tax without having the certificate of the taxing body before him, the court in holding the tax levy void, thus observes: “The tax certificate which the school directors are empowered to make by section 44 \* \* \* is the basis of all school taxes. In a sense such certificates are jurisdictional, and any tax extended for school purposes where no such certificate has been returned by the directors, as required by that section of the statute, is without authority of

33—Spring Valley Coal Co. v. Ill. 351 (Af.); Toledo, St. Louis & People ex rel., 157 Ill. 543 (Af.); West. R. Co. v. People, 225 Ill. 425 I. D. & W. Ry. Co. v. People, 201 (Af.).

law, and would be null and void." Bill in equity to enjoin.—Decree aff.<sup>34</sup>

Section 2, art. 8, Laws of 1889, giving the form of the certificate that school directors shall use is mandatory.

Court: "The certificate which the school directors are empowered to make by said section 2, lying as it does at the basis of a school tax, is jurisdictional in its character and a tax extended without such a certificate of the directors, is without authority of law, and null and void."

Here the statute said: "building purposes"; the certificate said: "repairing and heating purposes."<sup>35</sup>

The statute required the school directors to make a certificate of the amount of money to be raised. In the record appeared a certificate signed by three men (less than a majority) styling themselves school directors, etc., but there was nothing of record to show that the board, as a board took any action or authorized what the three members did. In holding that the record of the school board could not be vitalized *ab initio*, the court observes: "To have permitted the amendment proposed would not be to correct a mistake or omission of the municipal body levying the tax, or of its officers, but would have been to have made a valid levy."<sup>36</sup>

A certificate of the board was amended by adding to two of the signatures attached to the certificate respectively, "president" and "secretary." Court: "But the difficulty is that this amendment did not cure the fatal defect, viz.: that the certificate was not the certificate of the board, nor was it made to appear that it was

34—Weber v. Ohio and Miss. Railway Co., 108 Ill. 451 (Af.); also People ex rel. v. Smith, 149 Ill. 549 (Af.); People v. C. & N. Ry. Co., 183 Ill. 311 (Af.); C. & A. R. Co. v. Martin, 171 Ill. 544 (R.).

35—Chicago and Alton R. Co. v. People ex rel., 163 Ill. 616 (R. R.).

36—People ex rel. v. Smith, 149 Ill. 549 (Af.).

authorized by the board. The certificate is jurisdictional. Without it the tax is void."<sup>37</sup>

#### CERTIFICATE CURED UNDER SEC. 191

Following *Weber v. O. & M. R. Co.*, 108 Ill. 451. If the certificate of the school directors furnishes the county clerk with facts sufficient for him to determine amount of tax required, the certificate will be held sufficient under section 191 of the Revenue Act which provides that informalities that do not affect the substantial justice of the tax shall not "affect the tax or the assessment."<sup>38</sup>

#### CERTIFICATE NOT WITHIN SEC. 191

Under cover of "educational purposes" a levy of a tax for the re-construction of a school building, that should come under the classification of "building purposes," can not be sustained.<sup>39</sup>

Facts: July 3, 1897, the president and secretary of the board of education certified to the township treasurer that they required \$7,500 to be levied as a special tax for school purposes on taxable property, \$374.85 of this amount was extended against the property of the railroad. The company paid 2% and objected to the excess. The court in sustaining the act of the company observes: "This certificate (*Hurd's Stat.*, chap. 122, art. 8, sections 1, 2) is the basis of all school taxes. It constitutes the levy and the evidence of it, and any tax not based upon a lawful certificate is null and void. The

37—*Chicago and Alton R. Co. ex rel. v. People*, 171 Ill. 544 (R.); *People ex rel. v. Ch. & N. W. R. Co.*, 183 Ill. 311 (Af.). Certificate jurisdictional. *Chicago & Northwestern Railway Co. v. People ex rel.*, 184 Ill. 240 (R. R.). Court cannot vitalize a levy void *ab initio*.

38—*C. & A. R. Co. v. People ex rel.*, 155 Ill. 276 (A. & R.); *C. & A. R. R. Co. v. People ex rel.*, 163 Ill. 616 (R. R.); *P v. Smith*, 149 Ill. 549 (Af.).

39—*Wabash R. R. Co. v. People ex rel.*, 187 Ill. 289 (R. R.).



form of the certificate is mandatory, and if it is for school purposes and fails to state that a tax is required to be levied for building purposes, a levy beyond 2% will be void.<sup>40</sup>

At the hearing it was attempted to amend by showing that at a subsequent meeting in August the record of the school board was changed and a proper record made. But as the court observes: "No change was made in the certificate which had been transmitted to the township treasurer."

#### RATE OF LEVY—EXCESS MAY BE ABATED

If the directors or school board in certifying the amount of money needed for the school exceed the statutory and constitutional limit, the excess should be abated by the clerk in extending the tax. \* \* \* (A school tax levied for the year 1891 must be based upon an assessment of property for that year, and not for the year 1890.)<sup>41</sup>

#### CERTIFICATE CURED UNDER SEC. 191

President and clerk of board of education signed the following certificate: "We hereby certify that we require the amount of \$2.00 on each \$100 to be levied as a

40—St. Louis, Rock Island and Chicago R. Co. v. People ex rel., 177 Ill. 78 (R.).

At the hearing it was attempted to amend by showing that at a subsequent meeting in August the record of the school board was changed and a proper record made. But as the court observes: "No change was made in the certificate which had been transmitted to the township treasurer."

41—Wabash Railroad Co. v.

People ex rel., 147 Ill. 196 (R. R.).

Following is Chicago and Alton R. Co. v. People ex rel., 155 Ill. 276 (R. R.). Here the county court had rendered judgment for an amount including an excess of \$69.30 and the court observes: "The county clerk having failed to make the abatement before extending the tax, the taxpayer is entitled to have it done in this proceeding, otherwise the limit fixed by the statute would become a dead letter."

special school tax for school purposes and \$1.00 on each \$100 for building purposes on the taxable property of our district for the year 1894. Given under our hands this 11th of August, A. D., 1893. Filed in the office of the county clerk, Aug. 14, 1893.

Held. Though the certificate did not conform to the statute it was not void under the liberal construction required by the Revenue Act, Sec. 191. The certificate furnished the county clerk facts upon which to determine the amount required to be extended on the tax books.<sup>42</sup>

The tax certificate levy of the board was not signed by the proper number. But all were present and would have signed if so advised. Held no error to allow amendment.<sup>43</sup>

Question was whether the tax levy exceeded the statutory and constitutional limit. (Sec. 12, art. 9, of constitution.) Levying a tax to pay interest on outstanding bonds and to provide a sinking fund to pay the principal is not illegal.<sup>44</sup>

#### AMENDMENTS TO CERTIFICATE

At a meeting of the school board proper action was taken to have a certificate of amount of money certified, but through a misapprehension, as to the proper number of members to sign, it was defective. On the application for judgment, it was permitted to amend by having proper persons sign.<sup>45</sup>

42—Chicago and Alton R. Co. v. People ex rel., 155 Ill. 276 (Af.).

43—Spring Valley Coal Coma Company v. People, 157 Ill. 543 (Af.); also Chicago & Northwestern R. Co. v. People ex rel., 183 Ill. 247 (Af.).

See this case on point with reference to the validity of the library fund tax.

44—People ex rel. v. Peoria & Eastern R. Co., 216 Ill. 221 (R. R.).

45—Indiana, Decatur & Western R. Co. v. People, 201 Ill. 351 (R. & A.).

For mode of finding value of capital stock and rolling stock of a railroad. See Ohio & Mississippi R. Co. v. Weber injunction, 96 Ill. 343 (Af.).

At the hearing it appeared that the members of the board were present and acting in their official capacity at a regular meeting, that the necessary amount to be levied was ascertained and declared.

President and secretary signed; others did not.

The court permitted the certificate to be amended by the addition of the signatures of the other members and the substitution of "board of education" for "directors." Held no error.<sup>46</sup>

On July 31, 1905, a resolution was passed by the board of education to install in the new building a heating plant and a levy was made to cover this expense.

By an election previously held the board was authorized to build the building. Court: "Under that authority (election) they also had a right to levy an additional amount for building purposes to supplement the bonds which they were authorized to issue. \* \* \* "Boards of education have authority to levy taxes for two things: educational purposes and building purposes."<sup>47</sup>

At a regular meeting of the board of education a tax was voted but no certificate was made, authorized or signed. \* \* \*

The next day the member, who acted as president, and the secretary made a certificate signing it as president and secretary instead of "board of education."

Amendment refused. Held no error. The court following *C. & A. Co. v. P.*, 171 Ill. 544, and *P. v. Smith*, 149 Ill. 549, says: "The certificate is jurisdictional. Without it the tax is void."<sup>48</sup>

Under constitution (sec. 12, art. 9) and sec. 202, ch. 122, Hurd's Rev. 1901. A school board can levy but two taxes: one for building purposes and one for educational purposes. Bonded indebtedness must be paid

46—*Chicago & Northwestern Ry. Haute R. Co., People ex rel.*, 224 v. *The People ex rel.*, 183 Ill. 247 Ill. 155 (Af.). (Af.).

47—*St. Louis, Alton and Terre By. Co.*, 183 Ill. 311 (Af.).

out of taxes so levied and levy cannot exceed rate provided by statute.<sup>49</sup>

LEVIES BY TOWNS—CERTIFICATE—ERROR TO AMEND

A certificate of the levy of \$9,000 tax for the town of Georgetown recited that the tax was required "for town purposes." It was conceded that this was too indefinite. In holding the following amendment improper "to defray the running expenses of said town for the ensuing year," the court observes: "The record of the annual town meeting of this town was not introduced in evidence. This amendment was improperly allowed, as there was nothing before the court by which it could be allowed."<sup>50</sup>

Facts: At the annual town meeting motions were made as follows: That the sum of \$1,750 be levied as a tax for town purposes; "moved by A. that a tax of \$1,750 be levied for the payment of outstanding judgments against the town."

The town clerk certified to the county clerk these amounts. The county clerk extended the tax.

(It is apparent that the auditing board was entirely ignored.)

The objection was made that the annual town meeting was without lawful authority to direct any sum to be raised as a tax "for town purposes" or for the payment of "outstanding judgments." In sustaining the

49—Chicago & Alton Railroad Co. v. People ex rel., 205 Ill. 625 (Af.).

50—C., C. & St. L. Ry. Co. v. People ex rel., 205 Ill. 582 (R. R.); People ex rel. v. Raymond, 194 Ill. 51 (Af.); Cin., Ind. & Western Ry. Co. v. People ex rel., 213 Ill. 197 (Affirmed in Part); Ill. Cent. R. Co. v. People ex rel., 213 Ill. 174 (R. R.); St. Louis, Alton & Terre Haute Co. v. People, 225 Ill. 418 (Af.).

People ex rel. v. Ind., Ill. & Iowa R. Co., 206 Ill. 612 (Af.).

The certificate made by the clerk was for "town purposes." Held not sufficient. People ex rel. v. Ind., Ill. & Iowa R. Co., 206 Ill. 612 (Af.); Cin., Ind. & Western Ry. Co. v. People, 206 Ill. 565 (Af.).

See 225 Ill. 418.

objections the court observes: "The purposes had in view by the annual town meeting designated as "town purposes," may or may not have been such purposes as were authorized by law to be carried into execution by means of taxation." \* \* \*

Again the court observes: "It is not sufficient that an annual town meeting shall have voted upon a proposition to raise money by taxation for "town purposes." \* \* \*

Again: "The tax payer is not to be concluded by the opinion of the electors as to what are the legal purposes to forward which he may be required by the town to part with his money by way of taxation upon his property."

\* \* \* The face of the record must be sufficient to enable the court to see that the taxes are levied to accomplish some purpose whereof the town was vested with authority.<sup>51</sup>

#### SUCCESSFUL DIRECT ATTACK

Under statute of 1901 laws, p. 272, tax extended by the clerk erroneously by following the "valuation as fixed by the state board of equalization."<sup>52</sup>

The certificate of the town clerk recited "at the annual town meeting held at that town it was voted to levy \$3,000 as a tax for town purposes." \* \* \* insufficient.<sup>53</sup>

(Sec. 122, Laws 1872, p. 21.)

The statute declared that proper authorities of towns, villages "shall annually, on or before the annual

51—People ex rel. v. Chicago & Alton R. Co., 194 Ill. 51 (Af.).

52—Clev., Cin., Chi. & St. Louis Ry. Co. v. People ex rel., 223 Ill. 17 (R. R.).

S. P.—15

53—Cin., Ind. & Western Ry. Co. v. People ex rel., 111 Ill. 107 (Af.) in Part;.

Tuesday in August, certify to the county clerk the several amounts which they require to be raised by taxation." \* \* \* The certificates of town, school, road and bridge tax were not filed till after the time specified in the statute. \* \* \* Held error to render judgment for the town and other local taxes levied after this date. The court observing (law not directory): "Had the general assembly intended to permit the filing of the certificate at any time before the collector's books were delivered to him by the clerk, why not say so, and not have specified that the act should be done on or before a specified day?

"Again, this power of levying a tax, and thus summarily depriving the citizen of his property, is one of the greatest and most important acts of sovereignty. \* \* \* 'The levy is made, and the amount of property which shall be taken from the citizen is *ex parte*, and without notice to, or opportunity of, the tax payer to be heard before he is deprived of his property; and it is a power in the exercise of which there is great tendency to abuse, as those exercising the power are dealing principally with the property of others, in the levy and expenditure of the tax. \* \* \* It can not be held to be an unlimited authority, leaving the property of the citizen to the mercy of such bodies and officers.' " 54

#### UNSUCCESSFUL DIRECT ATTACK

Sale of delinquent lands for the taxes of 1872 and 1873; \$78,690 had been voted at the semi-annual town meeting to pay interest on park commissioners' bonds and to provide for a sinking fund for the retirement of the bonds. Objection, that there was no power in the town to provide a sinking fund and that it did not come within the statutory enumeration of "town charges." Held,

54—*Mix v. The People ex rel.*, 72 Ill. 241 (R. R.).

that it was sufficiently definite to come within the term "town charges."<sup>55</sup>

See this case commented upon in *People, ex rel. v. Ch. & Alton Ry. Co.*, 194 Ill. 51 (Af.).

#### SUCCESSFUL DIRECT ATTACK

Overseer's sworn list under sections 110 and 116—delivery to supervisor mandatory.

A town had adopted the labor system for the payment of road tax. The statute required the overseer of highways to give to the supervisor a sworn list of property, delinquent five days before the annual meeting of the county board. The supervisor never received the list and the list was never placed before the board. The court in sustaining the lower court in holding the levy void observes:

"Where the legislature has prescribed a certain method to be adopted to subject property to the burdens of taxation, that method must be substantially complied with before the property can be taken and sold in satisfaction of the tax."<sup>56</sup>

The overseer of highways (*C. & N. Ry. Co. v. People ex rel.*, 171 Ill. 525, R.) failed to give to the tax-payer three days' notice (Sec. 108, Laws of 1883, p. 160) to work out his road tax. Held not a *mere irregularity*, but a substantial right, that invalidated the levy of the commissioners.

#### ROAD AND BRIDGE TAX—SUCCESSFUL DIRECT ATTACK

The first Tuesday in September is the day fixed for determining the amount of tax to be raised for the ensuing year. \* \* \*

55—*Wright v. The People ex rel.*, 87 Ill. 582 (Af.).

*Chicago & Northwestern Railway Co. v. People ex rel.*, 171 Ill. 525, reversed.

56—*People ex rel. v. C. B. & Q. R. Co.*, 164 Ill. 506 (Af.).

The commissioners met on Tuesday (the 6th) and adjourned to the 13th, when they made a levy of 40 cents on the \$100.

Court: "After the commissioners met on the day specified in the statute, we do not think it was an abuse of power to defer action and adjourn to a specified day, \* \* \* and then on that day meet, and go on with the business. So far, therefore, as the levy of September 13th is concerned, we think it is valid."

On October 30th the commissioners held another meeting and made an additional levy of 20 cents on the \$100. \* \* \* It was claimed that this was authorized under section 14. In holding this levy invalid the court observes:

"The consent of a majority of the board of town auditors was obtained, but at the time the consent was obtained, on the 20th of October, the Commissioners of highways had no authority to make the levy. There is no statute which authorizes two levies in one year, and when the levy of September 13th was made, the commissioners had exhausted their power."<sup>57</sup>

#### NO COPY OF CERTIFICATE FILED—RATE TOO HIGH

A document from which the county clerk extended the tax for roads and bridges stated that the rate per cent agreed upon by the commissioners of highways, at the semi-annual meeting was sixty cents. It was signed by three commissioners and not certified by the town clerk.

Attached to it was the written consent of the assessor and board of town auditors granted upon the petition of the commissioners for an additional levy of twenty cents.

57—St. Louis Nat. Stock Yards v. People ex rel., 127 Ill. 22 (R. R.).



The certificate filed with the county clerk read eighty cents instead of sixty cents.

The court permitted the eighty to be changed to sixty and during the progress of the trial on June 15, 1904, permitted the town clerk to make a certificate, date it September 3, 1903, and file it.

Objection was that there was no certificate of the town clerk on file with the county clerk when the tax was extended. Here the court says: "The clerk did not certify the levy but, instead, filed with the county clerk the original certificate. \* \* \* The town clerk failing to file a certificate of the levy, there was nothing to amend. The certificate of the levy of the tax is jurisdictional."<sup>58</sup>

The certificate of the levy of town tax was not sufficiently definite. It was amended to read: "To defray the running expenses of said town for the ensuing year" \* \* \* the record of the annual town meeting was not introduced in evidence. Held, that there was nothing to amend by and that the amendment was not sufficiently definite.<sup>59</sup>

Commissioners of highways certified: "Ordered levy a district road tax for labor purposes, forty cents on the last assessment roll." Held: Not a compliance with the statute. "No ascertainment of the amount of money necessary to be raised by amount or by a per centum upon each \$100 of taxable property." 2nd. Objection: Town clerk did not give notice of the alleged district road tax by posting notices as required by law.

This attempted levy was made on the 16th of April; the assessment roll was filed on the 4th of May. The town clerk gave a notice required by section 88 on the 16th of April in place of on the 4th of May. The court

58—Cincinnati, Indiana and Western Ry. Co. v. People ex rel., 213 Ill. 197 (Af. in Part).

59—Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. People

ex rel., 205 Ill. 582 (R. R.); also Cincinnati, Ind. & Western Ry. Co. v. People ex rel., 212 Ill. 518 (Af.). This case attack was unsuccessful.

held in the absence of any proof that the notices were up and posted subsequent to the 4th of May, was not a compliance with the statute.

Court: "The failure of the commissioners to ascertain, as near as practicable, the amount of money necessary to be raised as a road tax, to levy and assess the same, and of the town clerk \* \* \* to give notice, are not mere irregularities, but failures to comply with the statute in substantial matters, which go to the foundation of the tax and vitiate the levy." Citing 171 Ill. 525. \* \* \*

2nd. A verbal statement by the commissioners that "an additional levy of twenty cents on each \$100 was needed."

Court: "The oral statement of the commissioners was not such a certificate as is contemplated by the statute. The power of the commissioners of highways to impose a tax is limited, and must be strictly construed (Newell case, 80 Ill. 587) and the provisions of a statute designed for the protection of the tax payer are mandatory and a disregard of them will render a tax illegal, and the substantial justice of a tax is affected if the authorities attempting to impose it have no power to levy it." <sup>60</sup> Citing *People ex rel.*, 193 Ill. 594. \* \* \*

Road commissioners made the levy on the first of September instead of the second Tuesday preceding the annual meeting of the county board—the record showed that no other meeting of the commissioners was held that year. The requirement to meet on a certain day is mandatory. The purpose is to give parties interested an opportunity to be heard.<sup>61</sup>

The commissioners met at the office of one of the commissioners on August 7, 1900, and attempted to levy the tax. The statute required that they meet on September

60—Chicago and Eastern Ill. Railroad Co. v. *People ex rel.*, 200 Ill. 237 (R. R.).

61—Chicago & N. W. Railway Co. v. *People ex rel.*, 197 Ill. 411 (R. R.).

4th at the town clerk's office. In holding the tax illegal the court observes:

"Provisions of the statute designed for the protection of the tax payer are mandatory and a disregard of them will render the tax illegal."<sup>62</sup>

#### ROAD TAX

##### ATTEMPTED LEVIES WITHIN CITIES

The commissioners of highways can not levy a road tax within the corporate limits of a city or village.<sup>63</sup>

Court: Commissioners of highways have no authority to levy a tax where the purpose is solely to maintain or construct roads or bridges within a city."<sup>64</sup>

##### TAX LEVY BY COMMISSIONERS—VOID

Judgment for taxes claimed to be due and unpaid for the years 1875 to 1883 was rendered.

In holding the levy void, the court observes: "The statute only authorizes them to act annually. But the statute nowhere declares that these highway commissioners may wait for nine years and then meet, and determine that a property owner shall pay a road tax for the past nine years—pay a gross sum in one year for the past nine years. \* \* \*

No such power is given, and as the power has not been conferred, it can not be exercised."<sup>64b</sup>

62—Chicago and North Western Ry. Co. v. People ex rel., 193 Ill. 594 (R. R.).

63—People ex rel. v. C. & N. Railway Co., 118 Ill. 520 (Af.).

64—People ex rel. v. Chicago & Alton R. Co., 172 Ill. 71 (Af.). See Session Laws 1903, Page 304, where provision is made for the highway

commissioners co-operating with a village, town, or city in the improvement of roads, streets, and bridges.

64b—Ohio & Miss. Railway Co. v. Calvin ex rel., 123 Ill. 648 (R. R.). Omitted school tax id. holding. Also Wabash Railroad Co. v. People ex rel., 196 Ill. 606 (R.).

## RATE

Under sections 62 and 64 of Stat. 1887, p. 278, statute granting power must be strictly construed. Total tax levy must be within the limit of fifty cents.<sup>65</sup>

## UNSUCCESSFUL DIRECT ATTACK

*Amendment under curative section 191, chapter 120, R. S. 1874.* On the application for judgment (C. I. & W. Ry. Co. v. P. ex rel., 212 Ill. 518) of sale for a delinquent road and bridge tax levied under the provisions of section 119, chapter 121 (Ses. Laws 1883, p. 163) a motion was made by the counsel for the appellee for "leave to amend the record of the proceedings of said highway commissioners and that the highway commissioners have leave to amend said certificate of levy to correspond with the facts." In support of the motion it was made to appear that a statement, signed and filed in the town clerk's office but not "attached to the page of the record book upon which the record of the proceedings in said meeting was written," did show that it had been ascertained and determined that \$1,500 was the amount necessary for making and repairing of bridges. Through inadvertence this finding had been omitted from the certificate of levy, which simply named the rate per cent on assessed value.

On review the granting of this motion was sustained and it was held, that said section 119 did not require more to be stated in the certificate than the rate per cent; and that it was not necessary to incorporate in the certificate "the several amounts which they have ascertained" for the different purposes named in said section 119. In so holding the case of C. I. & W. R. Co. v. People, 207 Ill. 566, is overruled.<sup>66</sup>

65—People ex rel. v. Atchison, Topeka & Santa Fe Railway Co., 201 Ill. 365 (Af.).

66—Cin. Ind. and Western R. Co. v. People, 207 Ill. 566 (Overruled). Part of tax legal. Illegal portion

Attempt to prove the adoption of labor system. Following town record introduced in defense by appellant:

"At a special meeting held at Dr. Hobson's office on the 28th of August, 1883, after legal notice was given, the meeting was called to order.

One witness was called and said that he worked out his father's road tax for five or six years.

Held, that this evidence did not show that the necessary petition signed with not less than 25 legal voters had been filed. \* \* \*

Court: "The filing of the petition and the giving of the statutory notice were jurisdictional facts necessary to be proved. They can not be presumed."

Held, that the presumption that officers did their duty would not be sufficient.

"Such a presumption is not sufficient to establish jurisdictional facts."<sup>67</sup>

Under section 119 of the Road and Bridge Act the commissioners of highways made a certificate of the amount of money desired for road and bridge purposes. The record of the board of supervisors contained this recital: "Now come the several supervisors and file with the clerk the following levies":

Point made by counsel that the statute required the board to take affirmative action, which affirmative action is jurisdictional.

Court observes: The statute requires no order of approval. "But any record from which it can be reasonably concluded that the statements were laid before the board \* \* \* would clearly be sufficient. \* \* \* The record here professes to be, and we must, because

can be rejected and judgment rendered for balance, "if it is so levied that the legal can be separated. *Cin. Ind. & W. Ry. Co. v. People ex rel.*, 212 Ill. 518 (Af.). Also *Ch. P. & St. Louis Ry. Co. v. Peo-*

*ple*, 214 Ill. 471 (Reversed on another point).

67—*Cleveland, Cin. Chi. and St. Louis Ry. Co. v. County Treasurer*, 183 Ill. 364 (Af.).

it is uncontradicted in any way, assume as a fact that it is, the record of the board of supervisors, and not of the action of the members of the board, apart from the board." 68

UNSUCCESSFUL ATTACK UPON A LEVY MADE BY  
COMMISSIONERS

Following certificate held sufficient:—

Commissioners will require \$2,600 \* \* \* said amount being 40 per cent on each \$100 valuation \* \* \* etc. Also that at an annual town meeting held on April 7, 1903, an additional levy of 20 per cent was ordered.

Section 119 of chapter 121 does not require the certificate to state the amount required for each purpose. 69

Question: Is it indispensable to the validity of a judgment for taxes that the delinquent list required to be made out and returned to the overseers of highways shall be sworn to? Court: "In our opinion," no. "Nor is it indispensable that the board of supervisors make an order directing the clerk to extend district road taxes."

"The requirement in section 110 is clearly to furnish evidence of the fact of delinquency. But this is not jurisdictional. The jurisdictional facts are the levy of the tax, and the failure to pay it by the person lawfully charged. The defaulting tax payer is not interested in the affidavit." 70

68—Peoria, Decatur and Evansville R. Co. v. People ex rel., 116 Ill. 232 (Af.); Ohio and Mississippi R. Co. v. Commissioners, 117 Ill. 279 (R. R.).

P. D. E. R. C. v. P., 116 Ill. 232, is cited in the above case in support of the proposition that an extension of a tax under a certificate of the board of highway commissioners without the intervention of the act

of the board of supervisors as per statute is illegal and a judgment thus obtained will not support an action of debt. R. S. 232, Chap. 120.

69—Ill. Cent. R. R. Co. v. People ex rel., 213 Ill. 174 (R. R.).

70—Wabash Railway Co. v. People ex rel., 138 Ill. 316 (Af.).

It is not necessary under section 117 nor is it "the intention of section 117 that the board make an

## ROAD AND BRIDGE TAX—AMENDMENTS—ALLOWED

Here the record of the town meeting was introduced to show that no action was taken on a "motion to vote a tax." The court allowed the minutes of the meeting to be amended by the clerk, who was called and testified that in fact a motion was made and carried.<sup>71</sup>

## RAILROAD TRACK—AMENDMENTS AND PRESUMPTIONS

Board of supervisors ordered: "On motion the county clerk is ordered to extend fifty cents on the \$100 worth of property as a special road tax (and all other taxes certified by the proper authorities) in the year 1885."

Objection: That words in brackets were inserted at the December term instead of the September term. Held proper amendment.

Presumptions: In matters other than jurisdictional, in the absence of proof to the contrary by party on whom is the burden of proof, it will be presumed that the clerk in extending the tax did his duty. \* \* \*

Under the statute the county clerk is only bound to distribute valuation as equalized by the state board to the various towns in the county and not to road districts. \* \* \*

Section 10 of Act 1879, section 83, section 84 of the road law construed:

Whole railroad track \* \* \* point made that the whole railroad track could not be sold to pay the road tax in any one district. The company not having paid the tax in any district, held that it could.

*Prima facie* case. The collector's return is *prima*

original levy, but merely supervise the levy already made by the highway commissioners. *Wabash R. R. Co. v. People*, 138 Ill. 303 (Af.).

71—*Chicago & Northwestern Ry. Co. v. People ex rel.*, 174 Ill. 80

(Af.); *Toledo, St. Louis & Western R. Co. v. People*, 225 Ill. 425 (Af.).

When valuation of state board of review shall be used, see *St. L. R. Co. v. People*, 225 Ill. 418; 223 Ill. 17.

*facie* legality of a tax and if it is claimed that the labor system has been adopted, the burden is on objector to show it.<sup>72</sup>

The county clerk omitted to attach to the copy of the papers filed with the clerk of the county court, that they were true copies. (Certificate omitted.)

Amendment properly allowed. \* \* \*

The objection was made that two townships had not legally adopted the labor system. \* \* \*

Point: The petition provided for in section 80 to be filed in the town clerk's office was signed by 21 instead of 25 legal voters;

2nd. That the record in the East Fork's district (township) did not show that any petition was filed, as required by statute. \* \* \*

The town clerks in both towns were called with their record books and it appeared that in one book there was recorded a petition with only 21 names and in the other book there was no record of any petition.

It was sought to draw therefrom that there was no sufficient petition on which to base a road tax levy in labor.

Court: "It devolved upon the appellant in order to defeat the tax, to show that no petition for the submission of said proposition was on file in the office of the town clerks of said townships, respectively, and that the proposition to adopt the labor system had not been adopted in said townships, or either of them, by other evidence than that the petition and the submission of the question of the labor system was not matter of record in said townships, as we think it clear the labor system might legally be in force in a township, without the record book of the town clerk showing that fact." <sup>73</sup>

Thomas Leachman, as town collector under a warrant

72—Ohio and Miss. Ry. Co. v. Railroad Co. v. People ex rel., 225 People ex rel., 119 Ill. 207 (Af.). Ill. 425 (Af.).

73—Toledo, St. Louis & Western



from the county clerk levied upon the property of Michael Dougherty for the amount of road and bridge tax that had been extended against his property.

Facts: "On the 30th of October, 1874, appellant made a certificate, signed by himself as town clerk, in which he stated that the commissioners of highways, at a meeting at the town clerk's office on the first of Sept., 1874, assessed the amount of \$1,200 on the real and personal property of the town for the then next ensuing year. This was filed in the county clerk's office on the 9th of Nov., 1874, and the county clerk thereupon proceeded to extend the tax." \* \* \*

The town collector distrained the property of the appellee, "and in this consists the trespass complained of." \* \* \*

The statute, Sec. 120, Ch. 121, R. S. 1874, required that the statement with reference to the amount of tax needed by the commissioners should be in the possession of the board of supervisors on or before its September meeting. \* \* \*

Court: "It is evident the board of supervisors is to exercise a supervision in the matter; and this being so, the requirement is jurisdictional, and without it the clerk was not empowered to extend the tax."<sup>74</sup>

74—*Leachman v. Dougherty*, 81 Ill. 324 (Af.).

*Litchfield & Madison Ry. Co. v. People ex rel.*, 225 Ill. 301 (R. R.). Section 119 requires that the original statement signed by the highway commissioner shall be delivered to superintendent and the same submitted to the board. In this case the town clerk sent a copy.

*C. & N. W. Ry. Co. v. People*, 184 Ill. 174 (R. R.).

*People ex rel. v. K. & S. R. Co.*, 218 Ill. 588 (Af.). See distinction

between cash system and labor system. Only objections made in writing can be considered. See exception.

*Chicago and Northwestern Railway Co. v. People ex rel.*, 181 Ill. 174 (R. R.); *Toledo, St. Louis & W. R. Co. v. People*, 226 Ill. 557 (R.); *Ind. Dec. & Western R. Co. v. People ex rel.*, 201 Ill. 351 (R. R.); *Litchfield and Madison Ry. Co. v. People ex rel.*, 225 Ill. 301 (Rev. in part and affirmed).

## FACTS NOT WITHIN CURATIVE SECTION 191

Facts: The village of Russellville passed the proper appropriation ordinance, at the time pointed out in the statute and also the levy ordinance, within the time prescribed by the statute.

Court: "The village clerk deposited with the county clerk what appears to be the original appropriation ordinance. No certificate was attached. No other document of any kind was filed with the county clerk for the purpose of authorizing him to extend the tax levied."

Court below enjoined the collection of the tax.

Court: "In the absence of a *certified* copy of the ordinance levying the tax, the county clerk was without authority to make the extension. The certificate of the levy of the tax is jurisdictional."

On the trial it was shown by the village clerk that he sent the wrong ordinance; that he intended to send the tax levy ordinance. Counsel asked to make correction but the court said: "It is too late now."

This omission can not be cured by *section 191*.

Court: "Nothing which purported to be a copy of the levy ordinance had been filed with the county clerk, and there was therefore nothing to amend." <sup>75</sup>

SUCCESSFUL ATTACK UPON LEVIES BY COMMISSIONERS OF  
HIGHWAYS, SCHOOL BOARDS AND TOWNS

*Acts that are jurisdictional* or non curable under section 191.

Facts: After the commissioners had made a levy in compliance with the statute, they met on the *20th of Oct.* and pretended to levy an extra tax, under and in pursuance of section 14 of the statute, of 40 cents on the \$100.

75—Russellville et al., Village of  
v. Purdy et al., 206 Ill. 142 (Af.).

The consent of a majority of the auditors was obtained. Levy void (this jurisdictional). Certificate made.

Court: Application to the town auditors "can only be done on Tuesday next preceding the annual meeting (first Tuesday in Sept.) of the county board. \* \* \* Nor does the statute (section 13, 14 and 16) contemplate two certificates of levy, but, on the other hand, one levy and one certificate."

**Tax levy void—*jurisdictional*.<sup>76</sup>**

**Facts:** Objection to special road tax, towns and town judgment tax and village tax were made. The special road tax was sought to be levied under section 119 of chapter 121.

**Certificate that  
Formed the Basis  
of the Special Tax**

"Following is the request of the highway commissioners of the town \* \* \* to stone and gravel the following named roads hereinafter described: From the line of James B's to North end of Sag and Lemont road, com'sioner's district No. 1, \$250. Moved and seconded that said request be granted. Motion so carried."

Court: "In the absence of an affirmative showing of a strict compliance with the requirements of this statute any special road tax levied thereunder will be void."

To say the language: "the request of the highway commissioners to stone and gravel the road be granted," means "that the several sums indicated are hereby authorized to be raised by taxation," would be giving those words a meaning entirely different from that which, in common acceptation attaches to them. The electors may have intended to direct a levy of a special road tax,

76—St. Louis Nat. Stock Yards  
v. The People ex rel., 127 Ill. 22  
(R. R.).

but the record of their meeting cannot be said to indicate any such intention, and must be held invalid to warrant the county clerk in extending.

Here the town board of auditors met on May 17th in place of the day named by the statute: Held day of meeting was mandatory. A tax based upon a *certificate* that showed that the meeting was at a time different from that named by the statute would render the tax illegal.<sup>77</sup>

Facts: Objection was: that commissioners did not comply with the statute in levying the tax and had no power to levy the same.

Statute section 13 (road statute), Chap. 121, said commissioners shall meet on same day and place as the town board of auditors (by statute that date that year was Sept. 4th), to wit: town clerk's office.

Violation of statute: Commissioners met on August 7th at the office of one of the commissioners, and passed a resolution that a tax of sixty cents on every \$100 of property in the town should be levied for road and bridge purposes.

The town clerk made his certificate of said levy on August 10th to the county clerk, and the certificate was filed in the county clerk's office Sept. 12th.

The people sought to cure the omissions and disregard of the provisions of the statute by invoking section 191. But the court in holding that the section does not cover this case observes: "The substantial justice of a tax is affected, if it is one that the authorities, attempting to impose it, have no power or right to impose. Provisions of the statute designed for the protection of the taxpayer are mandatory and a disregard of them will render the tax illegal. \* \* \* The provisions of section 191 do not make proceedings valid which are void

<sup>77</sup>—Chicago and Alton R. R. Co.,  
Appellant v. People, 190 Ill. 20 (R.  
R.).

ab initio. \* \* \* If the levy could be made a month before the end of the fiscal year to pay orders outstanding at the end of that year \* \* \* it would be equally valid if made six months." 78

Facts: Objection \$74.74 delinquent district road tax in town Papineau, labor system; \$120.72 delinquent road and bridge tax in town Middleport, cash system.

On April 16 at a regular meeting of the commissioners they entered of record the following:

"Ordered levy a district road tax for labor purposes, forty cents on the last assessment roll."

Court: "The question therefore arises, is such an order a compliance with the provisions of section 83 above referred to? We think not. When the legislature has prescribed a certain method to be adopted to subject property to the burden of taxation, that method must be substantially complied with before the property can be taken and sold in satisfaction of a tax. It was the duty of the commissioners to ascertain how much money must be raised by tax \* \* \* and to levy and assess. Here there was no ascertainment of the amount of money necessary to be raised by amount, or by per centum.

The statute required the clerk to give notice within ten days after the assessment roll was filed with the clerk; but in this case it was not done.

Court says: "The failure of the commissioners to ascertain \* \* \* the amount of money necessary to be raised as a road tax \* \* \* and of the town clerk, within ten days after the commissioners have filed in his office the amount of road tax assessed are not mere irregularities but failures to comply with the statute in substantial matters, which go to the foundation of the tax and vitiate the levy."

78—C. & N. W. Ry. Co. v. The People, Appellee, 193 Ill. 594 (R. R.).

As to objection to Middleport tax. This was attempted to be levied under sections 13 and 14 of the chapter 121. The commissioners made no certificate but only made an oral statement at the meeting of the town board of auditors.

Court says: "It is contended that such certificate by the commissioners not having been in writing, it, in law, amounted to no certificate. \* \* \* We are inclined to agree with such contention. 'To certify' is to testify in writing; to make known or establish as a fact. \* \* \* The oral statement of the commissioners was not such a certificate as is contemplated by the statute. The power of the commissioners of highways to impose a tax is limited and must be strictly construed \* \* \* and the provisions of the statute designed for the protection of the taxpayer are mandatory and a disregard of them will render a tax illegal. \* \* \* Board no power to act until the commissioners certify to them the fact that in their opinion a greater levy than 60 cents was needed." 79

Facts: The statute required the commissioners to meet on the first Tuesday in September to determine on amount of tax required, etc. This would be Sept. 3rd. No meeting was held upon that day at all but on September 9th a meeting was held, for the first time.

Court: "No action having been taken on Sept. 3rd, 1901, the day fixed by the statute, the levy made in the following week was void."

Failure to hold a meeting at the statutory time was not an *irregularity* that could be cured under the curative act, section 191, Revenue R. S. Stat., Chap. 120, 1906, page 1674.<sup>80</sup>

79—Chicago & Eastern Ill. R. R. Co. v. People, Appellee, 200 Ill. 237 (R. R.). Cited in Litchfield & Madison R. Co. v. People, 225 Ill. 301 (R. in part).

80—I. D. & W. Ry. Co., Appellant v. The People, 201 Ill. 351 (R. R.).

## SECTION 14—ROADS AND BRIDGES—SES. LAWS 1901, P. 274

Facts: The statute (Sec. 13, Ch. 121 R. S.) provides that the commissioners of highways may levy a tax of 60 cents on the \$100. If more is needed then certain steps must be taken to wit:

First: *Section 14*, the commissioners must definitely and specifically state for what particular purpose the excess of money is needed in a certificate that must be filed with the town auditors; then a majority of the town board or board of town auditors must make a certificate and in that certificate the *purpose of the extra expenditure* must be *definitely* stated.

The objection to the tax was that this *statutory* requirement was omitted. Court below permitted *amendment* to be made; the commissioners and board were called as witnesses. Held error, because they, by their testimony, were not showing what actually occurred but were exhibiting a list of purposes for the tax levy that never was presented to the board.

If the acts were done, but there was a failure to make a record thereof, then *amendment* may be resorted to.<sup>81</sup>

Facts: The objection was that the levy for road and bridge taxes was above sixty cents on each \$100 of taxable property; that section 14 had not been complied with, the court says:

“The making by a majority of the body composed of the board of auditors and the assessor of the written consent set forth in section 14 is jurisdictional and a condition precedent to the right to levy the tax, and in the absence of strict compliance with the requirements of the statute as to such consent any special road tax levied will be void.” Citing 200 Ill. 141.

<sup>81</sup>—Cleveland, Cin., Chicago and St. Louis Ry. Co., Appellant v. People ex rel., 205 Ill. 582 (R. R.).

With reference to the auditors' certificate the court says:

"The certificate of consent recites that the additional levy is needed 'in view of the contingency of floods, that building and repairing bridges.' "

The statute not only directs that the board of auditors should "consent, in writing \* \* \* but should, in such written consent, definitely and specifically direct the particular purposes to which the fund produced by the additional levy should be 'solely applied.' "

"The phrase not only falls short of that definite and specific direction \* \* \* but seems to be incomplete, and if not meaningless still uncertain instead of definite." <sup>82</sup>

Facts: The county clerk extended a "road and bridge" tax on an *original paper* signed by three commissioners stating the rate as 80 cents on the \$100 of valuation. Attached to it was the written consent of the assessor and board of town auditors granted upon the petition of the commissioners for an additional levy of 20 cents.

The statute required the town clerk to file not the original, but a copy.

The court on the hearing in June, 1904, allowed a certificate to be filed and dated back, as of September 3rd, 1903.

The court, in holding this error, observes: "The town clerk failed to file a certificate of the levy. There was nothing to amend. The certificate of the levy of the tax is jurisdictional. The reason why there could be no amendment was: that the town clerk had not filed any certificate; if he had filed some kind of a certificate, but one that was defective, that might have been amended." <sup>83</sup>

82—The People v. C. & A. R. R. People, ex rel., Appellee, 213 Ill. Co., Appellee, 205 Ill. 594 (Af.). 197 (R.).

83—C. I. & W. Ry. Co. v. The



## CITY TAX EXTENDED BY COUNTY CLERK—NO COPY OF LEVY ORDINANCE FILED

Facts: It was sought to sell land to pay city taxes. The county clerk extended the tax upon an ordinance that "was not authenticated in any manner or certified to by the city clerk, and there was nothing in the paper to show that it was a *copy* of any ordinance—nothing about the paper to show whether it was an *original* or a *copy*. Leave was given to amend by adding the clerk's certificate. Held error."

Court: "The only authority for extending a tax is some paper which purports to be a certified copy of an ordinance levying a tax. Under the established rules it was error to overrule the objections to these taxes." <sup>84</sup>

## SECTION 14—ROAD AND BRIDGE ACT—ATTEMPTED LEVY

Facts: Attempted levy under section 14 by commissioners. Objection was made to the following certificate:

"We require for road and bridge purposes and for the payment of outstanding orders drawn for the year for which the tax should be levied Sept. 1, 1903, the rate of 60 cents on \$100 and we also require the rate of 40 cents for road and bridge purposes, and paying outstanding orders drawn on treasurer." \* \* \*

Objection sustained and court observes: "Section 13 is a limitation upon the power of the commissioners to levy a road and bridge tax in excess of 60 cents. \* \* \* We think the taxpayers of the township, when called upon to pay the additional forty cents on each \$100, have a right to insist that the commissioners shall certify that there is a contingency justifying the levy." <sup>85</sup>

84—C. I. & W. Ry. Co. v. People, Chi., Ind. & St. Louis Short Line Appellee, 213 Ill. 558 (R. R.). Ry. Co. v. People ex rel., 225 Ill.

85—People ex rel. v. C. I. & W. 519 (R. R.). Ill. C. R. R. Co. v. People, 213 Ill. 503 (At.).

Facts: Town operating under the labor system. Section 119. The town clerk made a *copy* of the *tax certificate* and sent to the county clerk and he extended the tax.

In holding that this was not conforming to the statute, the court observes: "Under section 119, which is applicable to the tax now in controversy, the statute requires that the original certificate signed by the commissioners shall be delivered to the supervisors and laid before the board."<sup>86</sup>

This case follows: 184 Ill. 174.

Facts: Attempted levy under section 14: Objection sustained to the following certificate: \* \* \* In view of the contingency that the road and bridges could not be kept in necessary condition and repair for public travel with the regular levy \* \* \* additional amounts were necessary. Majority of board gave their consent.

Held: That there were not sufficient facts stated to sustain the position of the auditing board.<sup>87</sup>

#### UNDER SECTION 14, COMMISSIONER'S CERTIFICATE MUST CONTAIN FACTS NOT CONCLUSIONS

Facts: As to four of the towns the objection was that the towns were acting under the "labor system." Therefore the method of levy is controlled by section 119. That section requires the *original certificate* made by the commissioners and delivered to the supervisor to be placed before the board of supervisors.

ILL. 174 (R. R.). Statute authorizing levy *had not in fact* been followed. Hence amendment not permitted. See *op.*

Clev., Cin., Chi. & St. Louis Ry. Co. v. People ex rel., 223 Ill. 17 (Af.). Unsuccessful attack on a levy made under sec. 14, Road and Bridge Act.

86—People ex rel., Appellant v. Kankakee & Southwestern Railroad Co., 218 Ill. 588 (Af.).

87—St. Louis, Alton & Terre Haute R. Co. v. People ex rel., 224 Ill. 155 (R. in part).

Instead of doing that the clerk *filed* the *original* and sent a copy. Held not a compliance with the statute.

Section 14 says that the commissioners, when a contingency exists, can *certify* to the *town auditor* and with their consent an additional tax can be levied not to exceed 40 cents on the \$100.

The court in this case holds that the commissioners must certify the facts (not the conclusion) so that the town board with those facts before them can determine whether a contingency, such as contemplated has arisen. The reason for this, is, that the board have a right to withhold their consent. It is necessary therefore that the facts should be stated in the certificate. In this case the certificate did not state any facts, that showed the existence of any contingency:

The point is that *facts* not *conclusions* must be stated in the *certificate*.

The certificate is jurisdictional.<sup>88</sup>

Facts: Under section 14 the commissioners to the board of auditors certified: additional road and bridge tax "is needed in said town in view of the contingency that there is \$1,150 due on outstanding orders, and it will take all of the levy of sixty cents on each \$100 valuation to pay for the repairs and road work for the ensuing year."

In holding the certificate insufficient, the court observes: "For aught, that appears, the outstanding orders, to meet which this additional levy was made, may have issued for the purpose of paying the ordinary current expenses of the town. The certificate is not sufficient in that it fails to show the existence of any contingency." \* \* \*

In other words, the certificate states conclusions, not facts full and clear from which the auditing board can

88—Toledo, St. Louis & Western  
R. R. Co., Appellant v. People ex  
rel., 226 Ill. 557 (Reversed).

draw the conclusion, and determine whether to lend their consent or withhold it.<sup>89</sup>

Facts: Town of Hurricane under cash system. Attempted levy under section 14: the statement of facts to the auditors was as follows: A greater levy than 60 cents is needed for road and bridge purposes. Many of the bridges are becoming unsafe and will have to be repaired and rebuilt; ask extra levy to repair and build said bridges; new where needed, and additional levy should be 40 cents on \$100.

Following the construction put upon section 14 in 213 Ill. 503; 224 Ill. 155; and 226 Ill. 557, the court observes: "The condition stated in the certificate (the court states the definition of contingency, see opinion) is one of the ordinary and usual incidents of the existence and the use of bridges for travel. The certificate did not authorize the levy."<sup>90</sup>

Facts: Attempted levy under section 14 of a road and bridge tax.

Court says: "That a contingency exists, and what it is, must be stated in the certificate of the commissioners in order to make the tax levy valid \* \* \* the court should have sustained appellant's objection to said tax."<sup>91</sup>

Facts: Attempted levy under section 14. Idem holding.

Court says: "The nature of the contingency calling for the additional levy should be plainly stated in the

89—People ex rel., Appellee v. Kankakee Southwestern R. Co., 231 Ill. 109 (R. R.).

90—People ex rel., Appellant v. Toledo, St. Louis & Western Ry., 231 Ill. 125 (Af.) followed in:

People ex rel., County Collector, Appellee v. C. V. & C. R. Co., 247 Ill. 360 (R. R.).

91—People ex rel., Appellee v.

Cin. Laf. & Chr. Co., 231 Ill. 363 (R. R.).

People ex rel., Appellee v. T. St. L. W. R. Co., 231 Ill. 390 (R. R.).

Facts: Attempted levy under section 14, Idem, holding.

People ex rel., Appellee v. C. C. R. Co., 231 Ill. 438 (R. R.).

People ex rel., Appellee v. C. & E. I. R. C., 231 Ill. 454 (R. R.).

certificate with sufficient particularity to enable the board of auditors and assessor to determine whether the purpose is within the provisions of said section 14."

Facts: Delinquent road and bridge tax. (Cash system.) Town of Peoria. Under section 14 the commissioners made this certificate to the town board of auditors that a contingency had arisen to wit: "providing for the protection of the approaches to the said (across Illinois River) bridge. Court holds that this is not a sufficient statement of fact.

Court: "The necessity of protecting the approaches of a bridge may or may not result from a contingency. \* \* \* As to the protection for the approaches, it cannot be determined from the certificate whether a contingency existed, and the tax levied to provide that protection is therefore illegal."

Point of ruling is that a conclusion is stated rather than facts.<sup>92</sup>

Facts: Objections to road and bridge taxes in townships under the cash system. Attempted levy under section 14. Certificate said: "in view of the contingency that outstanding indebtedness for steel bridges and grading roads."

Court says: "No contingency existed as contemplated by the statute."<sup>93</sup>

Facts: In this case leave was given the town clerk to amend his certificate. Held rightly amended.

Point of objection was: Certificate of the highway commissioners to the auditors and assessor does not state the existence of a contingency within the meaning of section 14 of chapter 121.

Court: "This certificate recites that in the opinion of the commissioners the additional levy is necessary 'in view of the contingency that it is necessary, on ac-

<sup>92</sup>—*People ex rel., Appellee v. P. & P. U. R. C. R. R.*, 232 Ill. 540 (R. R.).

<sup>93</sup>—*People ex rel., Appellee v. Belleville and Eldorado Ry. Co.*, 232 Ill. 454 (R. R.).

count of their destruction, to rebuild immediately nine bridges.'” In holding that the certificate was not sufficient under the section 14 the court, after citing 232 Ill. 540: “One of the contingencies mentioned in the certificate was the necessity of providing for the protection of the piers of a certain bridge. We held this did not show the existence of a contingency; that if the necessity arose from the action of such high water as occurs occasionally every year, or from the wash of ordinary rain fall or other like causes, no contingency existed, while if the necessity resulted from a change in the course of the stream, or from some other like unexpected cause, a contingency did exist. Tested by these cases the certificate now before us does not satisfy the statute. Whether the destruction of the bridges creates a contingency depends entirely upon the character of the forces which worked the ruin, and this the certificate fails to show.”<sup>94</sup>

Facts: Certificate of a hard road tax under statute of 1883 not signed by the commissioners.

The town clerk sent to the county clerk the original of what the commissioners had drafted, though not signed. The town clerk did not make the certificate required by the statute.

Court: “Thus it will be seen that the certificate of levy by the commissioner to the town clerk and the certificate by the town clerk to the county clerk of the amount voted, are each of them jurisdictional and must

94—*People ex rel., Appellee v. Kankakee & Southwestern R. Co.*, 237 Ill. 362 (R. R.).

See good observation upon the practice of striking objections from the files. Practice condemned.

*People ex rel., County Treasurer, Defendant in Error v. Elgin, Joliet*

& Eastern R. Co., 243 Ill. 546 (R. R.); *People ex rel. v. The Wabash Railroad Co., Appellant*, 248 Ill. 540 (R. R.). Cites: *People ex rel. v. Kan. & Southwestern R. Co.*, 237 Ill. 362; *People ex rel., Appellee v. Lake Erie & Western R. Co.*, 248 Ill. 32 (R. R.).

be made by the officer or officers designated in the statute."<sup>95</sup>

Facts: At annual town meeting held Sept. 7, 1909, the highway commissioners presented a certificate that "on account of rains and floods," it would be necessary to make a levy, as provided in section 14 of the Road and Bridge Act, 1883. Thereafter the county clerk, after receiving the statutory certificate extended the tax.

Held. Following 231 Ill. 438; 243 Ill. 546; 224 Ill. 155: "The certificate did not comply with the requirements of the statute and was not a legal basis for the additional tax."<sup>96</sup>

#### CERTIFICATE OF SCHOOL BOARD—DEFECTIVE

For instance, school directors (Sec. 44, Chap. 122, R. S. 1874, p. 961), are required to ascertain how much money they may need for the ensuing year; as evidence of this need, they certify in writing under their respective signatures to the township treasurer on or before the first Monday in Sept.

Court says: "The tax certificate which the school directors are required to make by section 44 is the basis of all school taxes. In a sense such certificates are jurisdictional, and any tax extended for school purposes, where no such certificate has been returned by the di-

<sup>95</sup>—*People ex rel. Cooley, Appellee v. Woodyard*, 245 Ill. 387 (R. R.).

*People ex rel. County Collector, Appellant v. C. B. & Q. R. R. Co.*, 248 Ill. 81 (Af.). Here the county clerk, without *any certificate* of the town auditors extended a tax against the inhabitants of the town. Held, levy void. No jurisdiction.

<sup>96</sup>—*People ex rel. County Collector, Appellee v. Lake Erie &*

*Western Railroad Co.*, 248 Ill. 32 (R. R.).

*People ex rel. v. Atchison, Topeka & Santa Fe Railway Co., Appellant*, 252 Ill. 407 (R.). Cites and follows 248 Ill. 32.

*People ex rel. Collector, Appellee v. Toledo, St. Louis & Western Railroad Co.*, 249 Ill. 175 (R. R.).

*People ex rel. Appellee v. Wabash Railroad Co.*, 252 Ill. 316 (Af.). Cites 248-32 and 249-175.

rectors, as required by that section of the statute, is without authority of law, and would be null and void." 97

Facts: The school law required the directors to return a certificate of the needed amount of tax for the ensuing year on or before the first Tuesday to the treasurer; the treasurer was to return to the county clerk on or before the 2nd Tuesday of August. The certificate was signed in substantial conformity with the statute on Aug. 31st, and filed in the county clerk's office on Sept. 1st.

Court held that there was no certificate in law because the certificate was signed by less than a majority of the board and because the certificate did not emanate from the board itself acting as a board.

There was nothing to amend and so the Curative Act, section 191, could not apply. 98

A certificate for tax for school purposes was made and signed by the individuals after a meeting of the board at which a tax levy was voted but no certificate was made or authorized by the board. The certificate was signed by the president and secretary. On application for judgment mo. was made to amend. Held. Rightly refused because, the board, as a board never having acted there was nothing to amend. Pretended certificate was void. Court says: "The certificate is *jurisdictional*." 99

Facts: Election held to build a school house and for an appropriation of \$15,000. Carried.

The board issued three bonds of \$5,000 each.

Facts: Objection that the school tax in the town of Hartland is illegal.

97—Weber et al. v. O. & M. Ry. Co., 108 Ill. 451 (Af.).

98—People ex rel. v. Smith, 149 Ill. 549 (Af.).

C. & A. R. Co., Appellant v. People ex rel., 171 Ill. 544 (R.). Facts:

Idem as in Smith case and the court says "Certificate is jurisdictional. Tax void."

99—People ex rel. v. C. & N. W. Ry. Co., Appeal by people, 183 Ill. 311 (Af.).



Reason assigned: Certificate not signed by a majority of the board and not made by the board acting as a board, in the capacity of a board.

Directors held a meeting and a motion made and carried to levy the tax. No record was made of the action. No certificate was made. Afterwards the certificate was signed by the individuals.

Court: "The statute prohibits the board from transacting any official business except at a regular or special meeting. (School Law, Art. 5, Sec. 19.) The certificate is jurisdictional, and the levy could not be made valid by an *amendment*.

Court erred in overruling the objection.<sup>1</sup>

#### RIGHT TO AMENDMENT DENIED

Facts: Road taxes and school taxes were objected to. The road commissioners met and made a proper certificate of the levy, gave the certificate to their clerk. The clerk instead of certifying the levy, as the statute required to the county clerk he forwarded the original made by the commissioners. On this the tax was extended.

On the hearing the people were allowed to file a proper certificate. Held error.

While amendments may be allowed under section 191, still the filing of one paper of one kind when the statute requires another paper of another kind, namely, the certificate of the clerk, can not be held to be an attempted compliance with the statute or the filing of such paper as will authorize an amendment. The word amendment must be given its ordinary significance and when a new instrument must be filed it cannot be said "to be an amendment of the other."

1—C. & N. W. Ry. Co., Appellant  
v. People ex rel., 184 Ill. 240 (R.  
R.)

The county clerk extended a tax on the following:

“Dear Sir:—I write you to ask for commissioners of road district No. 1 asking for a levy of 50 cents on each \$100 valuation. Respectfully yours.”

The commissioners never signed any certificate. The clerk was allowed by the court below to make a certificate in due and regular form and order. Held error.

Court: “The essence of the levy was the action of the commissioners, and the only legal evidence of that action, as determined by the statute, is the certificate of the commissioners of the levy. Without such certificate the clerk, as a matter of law, did not and could not know and could not certify that a levy had been made.”<sup>2</sup>

#### LEVY BY TOWN AUDITORS—VOID

Facts: Objections were filed to a town tax, because the levy appeared to have been by the town auditors. It was agreed as a fact on the application for judgment, that no vote was taken in the township at the annual town meeting; that the question of raising money by taxation for town purposes was not acted upon in town meeting.

The town auditors at their annual meeting determined that 25% of tax should be levied and the town clerk certified this to the county clerk and this was all the basis there was for an extension of the tax by the county clerk.

Court: “There is nothing in the language of sections 7 and 4, Chap. 139, Art. 13, R. S., that can be construed to authorize the board of auditors to levy town taxes.”

“The judgment of the court below could only be sustained by holding that under section 191, the mere fact, that a county clerk has extended a tax, is conclusive evidence that it is just. This, clearly, is not what is

2—Ill. Southern Ry. Co. v. People, ex rel., 215 Ill. 123 (R. R.).

meant by the section. We are unable to find any authority of law for the assessment of this tax.”<sup>3</sup>

## PORTION OF THE TAX ILLEGAL

Where a tax is so levied that the illegal part can be separated from the legal part, a judgment may be rendered for the tax legally assessed.<sup>4</sup>

3—*P. D. E. Ry. Co. v. People ex rel.*, Appellee, 141 Ill. 483 (R.).

Cited and followed in *St. Louis, Rock Island & C. R. C. v. People ex rel.*, 147 Ill. 12 (Af.).

*Hopkins Rec. v. People ex rel.*, 174 Ill. 416 (R. R.). Town board levied a tax for town purpose. This could only be done in town meeting.

*Ind., Decatur & Western Ry. Co. v. P.*, ex rel., 201 Ill. 351 (R. R.). No certificate of town tax levy filed. Instead, certificate signed by supervisors.

*The People v. Glenn et al.*, 207 Ill.

50 (Af.). County clerk extended a drainage tax without having on file a valid certificate showing purpose for which tax is to be levied.

*Illinois Southern Ry. Co. v. People ex rel.*, 215 Ill. 123 (R. R.); *People ex rel.*, Appellee v. Woodyard, 245 Ill. 387 (R. R.); *People ex rel.*, Collector, Appellant v. C. B. & Q. R. Co., 248 Ill. 81 (Af.).

4—*State v. Allen*, 43 Ill. 456 (R. R.); *Allen v. Peoria & Bureau Valley Railroad Co.*, 44 Ill. 85 (R. R.); *People ex rel. v. Nichols*, 49 Ill. 517 (R. R.).

## CHAPTER XV

### PUBLIC REVENUE

#### SUCCESSFUL ATTACK IN EQUITY UPON APPROPRIATIONS OF THE TAX PAYER'S MONEY, OR UPON TAX LEVIES

*Bill to enjoin.* As a general proposition a tax that is void may be successfully attacked in equity. Under the following heads the cases of successful attack in equity can be classified: 1st. When money is about to be appropriated for private purpose, as contra-distinguished from a public or a corporate purpose.<sup>1</sup>

2nd. A tax levied upon personal property that is exempt, or not subject to the tax sought to be collected.<sup>2</sup>

3rd. Lack of power in the body imposing the tax.<sup>3</sup>

1—Colton et al. v. Hanchett et al., 13 Ill. 615 (R. R.); Schofield et al. v. Watkin et al., 22 Ill. 66 (R. R.); Sherlock et al. v. Winnetka, Village of, 59 Ill. 389 (R. R.); Jackson ex rel. v. Norris et al., 72 Ill. 364 (R. R.).

2—Ill. Cent. R. R. Co. v. McLean Co., 17 Ill. 291 (R.); Hunsaker et al. v. Wright et al., 30 Ill. 146 (Af.); Board of Supervisors et al. v. Campbell et al., 42 Ill. 490 (Af.); Deming et al. v. James, 72 Ill. 78 (R. R.); Ill. Cent. R. R. Co. v. Hodges et al., 113 Ill. 323 (R. R.); Moline Water Power Appellant v. Cox, County Treas., 252 Ill. 348 (R. R.).

3—Ottawa, Town of, et al. v. Walker et al., 21 Ill. 605 (R. R.); Drake et al. v. Phillips et al., 40 Ill.

388 (Af.); Perry et al. v. Kinnear et al., 42 Ill. 160 (R. R.); Briscoe et al. v. Allison et al., 43 Ill. 291 (Af.); Beauchamp v. Board of Supervisors Kankakee Co., 45 Ill. 274 (R.); Sherlock et al. v. Winnetka, Village of, 59 Ill. 389 (R. R.); Nat. Bank of Shawneetown v. Cook et al., 77 Ill. 622 (R. R.); Searing et al. v. Heavysides et al., 106 Ill. 85 (R. R.); Springfield, City of v. Edwards, 94 Ill. 626 (Af.); Law et al. v. People et al., 87 Ill. 385 (A. & R.); Irwin v. New Orleans, St. Louis & Ch. R. R. Co., 94 Ill. 105 (R.); Drummer, Town of v. Cox, 165 Ill. 648 (Af.); Stevens v. Henry, County of, 218 Ill. 468 (R.). (County board has no power to "contract with persons to search for property omitted in former years.")

Tax illegal in consequence of a failure to submit to a vote of the people some material question; that of raising the money or spending the money, or some other preliminary question.<sup>4</sup>

Assessment raised without notice to tax payers.<sup>5</sup>

A tax levied upon a district that extends beyond the limits of the body imposing the tax.<sup>6</sup>

When money to be raised will not be used for a corporate purpose.<sup>7</sup>

When statute under which tax is levied, is unconstitutional, or the amount of the tax is in excess of the constitutional or statutory limitation.<sup>8</sup>

4—*Beverly et al. v. Sabin et al.*, 15 Ill. 357 (Af.); *Vieley v. Thompson et al.*, 44 Ill. 9 (R. R.); *Mt. C. C. & R. R. Co. v. Blanchard*, 54 Ill. 240 (R. R.); *Harding v. R. R. & St. R. R. Co. et al.*, 65 Ill. 90 (R. R.); *Flack v. Hughes et al.*, 67 Ill. 384 (R. R.).

5—*Cleghorn v. Postlewaite et al.*, 43 Ill. 428 (R. R.); *Darling v. Gunn Collector, Town of*, 50 Ill. 424 (R. R.); *McConkey v. Smith*, 73 Ill. 313 (R. R.); *First Nat. Bank v. Cook et al.*, 77 Ill. 622 (R. R.); *Kimball Co. v. Mer. Sav. Loan & Trust Co.*, 89 Ill. 611 (Af.); *Huling v. Ehrich*, 183 Ill. 315 (R. R.); *Cox v. Hawkins, County Clerk of*, 199 Ill. 68 (R. R.).

6—*Gage v. Chapman et al.*, 56 Ill. 311 (Af.); *Cook, County of, v. C. B. & Q. R. R. Co.*, 35 Ill. 460 (Af.).

7—*Livingston, County of v. Weider*, 64 Ill. 427 (R. R.); *Primm et al. v. Belleville et al.*, 59 Ill. 142 (R. R.); *Marshall et al. v. Stillman et al.*, 61 Ill. 218 (R. R.); *Lee v. Euggles*, 62 Ill. 427 (R. R.); *Leitch et al. v. Wentworth et al.*, 71 Ill. 146 (Af.); *Chicago, City of v. Brede*, 218 Ill. 528 (Af.). (Here

the appellants were about to purchase improvement bonds issued upon a special assessment.) *Herschbach et al., Appellants v. Kaskaskia Island Sanitary & Levee Dist. et al.*, 265 Ill. 388 (R. R.).

8—*Porter v. Rockford, Rock Island & St. L. R. R. Co.*, 76 Ill. 591 (R. R.); *Gage et al. v. Graham et al.*, 57 Ill. 144 (Af.); *Ramsay v. Hoeger*, 76 Ill. 432 (R. R.); *Updike v. Wright*, 81 Ill. 49 (Af.); *Lemont, Town of, et al. v. Singer & Talcott Stone Co.*, 98 Ill. 94 (R. R.); *Crane et al. v. West Chicago Com'rs*, 153 Ill. 345 (R. R.); *Hodges et al. v. Crowley*, 186 Ill. 305 (Af.); *Pettibone v. W. O. P. C.*, 215 Ill. 304 (R. R.); *Rouse v. Thompson*, 228 Ill. 522 (Af.). (This was a bill by a taxpayer to enjoin the county treasurer from paying out funds to judges and clerks of a primary election. Statute held unconstitutional.) *Dollahon et al. v. Whittaker et al.*, 187 Ill. 84 (Af.). (Here the city tax exceeded the 2% limitation.) *Spring et al. v. Olney, City of*, 78 Ill. 101. (The limitation of special charter as to amount of tax levy is under control of general statute of

When money to be raised will be expended upon an illegal debt.<sup>9</sup>

Property assessed not owned on day named by the statute for lien to begin.<sup>10</sup>

When some jurisdictional step in making the levy, or in making sale after levy, has been omitted.<sup>11</sup>

An assessment made by an assessor who acted without warrant of law, in respect to the property assessed.<sup>12</sup>

An assessment spread and levied through fraudulent practices.<sup>13</sup>

Where levy has been made upon lands platted and subdivided by one unauthorized and not the owner.<sup>14</sup>

Where the State Board of Equalization has fixed "a valuation through prejudice or reckless disregard of duty in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the court to interfere and protect tax payers against the consequences of its acts." "Valuation must be the result of honest judgment, and not of mere will." Demurrer to bill overruled.<sup>15</sup>

A tax "directed to be levied by the proper authorities of a school district in the previous years" based "upon

1872. Bill to restrain collection of tax of 1% dismissed.)

9—Wright et al. v. Bishop, 88 Ill. 302 (Af.); Chicago, City of v. Nichols, 177 Ill. 97 (Af. R.); Lindblad v. Board of Education, etc., 221 Ill. 261 (R. R.).

10—Searing et al. v. Heavysides et al., 106 Ill. 85 (R. R.).

11—Vieley v. Thompson et al., 44 Ill. 9 (R. R.); Weber et al. v. O. M. Ry. Co., 101 Ill. 451 (Af.); Russellville, Village of v. Purdy et al., 206 Ill. 142 (Af.); Goss v. Dyche, 214 Ill. 417 (Af.); McCraney v. Glos et al., 222 Ill. 628 (R. R.).

12—Nat. Bank of Shawneetown v. Cook et al., 77 Ill. 622 (R. R.); Anderson v. C. B. & Q. R. R. Co., 117 Ill. 26 (Af.); Peoria, Decatur & Evans. Ry. Co. v. Goar, 118 Ill. 134 (R. R.); Allhood v. Cowen et al., 111 Ill. 481 (R. R.); Hanberg v. Western Cold Storage Co., 231 Ill. 32 (Af.).

13—Dempster et al. v. Chicago, City of, 175 Ill. 278 (R. R.).

14—Gage et al. v. Rumsey et al., 73 Ill. 473 (Af.).

15—Chicago, Bur. & Quincy R. R. Co. v. Cole et al., 75 Ill. 591 (R. R.); Calumet & Chi. Canal & Dock Co. v. O'Connell, 265 Ill. 106 (R. R.).

an assessment of the valuation made of the year'' current.<sup>16</sup>

Money about to be paid to a teacher in the common schools who has not received the statutory certificate of qualification to teach.<sup>17</sup>

Appropriation of money by a school board for carrying out contracts that are illegal or against public policy, may be enjoined.<sup>18</sup>

Where a tax is unauthorized by law, we have held that it was the duty of the court of equity to interfere, especially when the recovery of the tax would necessitate a multiplicity of suits.<sup>19</sup>

On right of tax payer to have credits allowed under section 27 of the Revenue Act.<sup>20</sup>

Appellant was notified to appear before the board of review and show cause why his assessment for 1901 should not be increased. There was a list of mortgages (\$84,400) that appeared of record in his name. He testified that he had transferred the said mortgages and did not own them on the 1st day of April. On his refusing to give the names of the persons to whom he had transferred them his assessment was raised to \$84,400. Held, that this assessment could be enjoined in equity.<sup>21</sup>

Misconduct of a collector in not receiving money for 3 forties from the owner because 4 forties were assessed in toto.<sup>22</sup>

Wood Appellant v. Peoria, City of, 271 Ill. 173 (R. R.).

Equity sustained an attack upon two assessments. The property owners' address on the assessment roll

16—*Lebanon v. O. & M. Ry. Co.*, 77 Ill. 539 (Af.); *Kimball, Col. v. Mer. Loan & Trust Co.*, 89 Ill. 611 (Af.).

17—*Board of Education of Galesburg et al. v. Arnold*, 112 Ill. 11 (Af.).

18—*Adams v. Brennan*, 117 Ill. 194 (R. R.)

19—*Drainage Com'rs v. Kinney*, 233 Ill. 67 (Af.).

20—*Bates v. Parker et al.*, 227 Ill. 120.

21—*Condit v. Widmayer*, 196 Ill. 623 (R. R.).

22—*Lawrence v. Miller*, 86 Ill. 502 (R. R.).

was erroneous; the address on the notice of the final completion of the improvements was erroneous. The property owner did not have actual notice of the assessment, which itself was unjust. Held: Equity would enjoin.

*Zeigler Appellee v. Douglas et al.*, 283 Ill. 407 (Af.). School tax enjoined. Dispute as to which of two adjacent high school districts had a right to levy a tax in one and the same territory, under sec. 3, High School Act, Ses. Laws 1917 p. 745.

**ELECTORS NO VOICE IN THE SELECTION OF THE MEMBERS OF  
THE BODY IMPOSING THE TAX**

Bill to enjoin certain taxes levied by three men who had been appointed by an act of the legislature which created a body corporate under the name of "The St. Clair and Monroe Levee and Drainage Co." The act authorized the company to assess an annual tax of \$20,000 upon the lands in the designated district, "in proportion to the benefits to accrue to each tract, and where no benefit is to arise, the land not benefited is not to be assessed. Of this the corporation is left to be the sole judge, as no mode is pointed out for determining that question. (Quoted from page 132.) The act was never in any mode submitted to a vote of the inhabitants of the district embraced in this district, and the property holders who are to be taxed have no voice in the control of the company, the selection of officers, or the imposition of the tax."

Demurrer to bill sustained and complainants appeal. Court quote the 5th section of article 9, of the Constitution of 1848. This clause, the court holds, limits corporate taxation to corporate purposes alone; and then say that the case at bar presents the question: "Whether it was not also intended as a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other person than the corporate or local



authorities." The court holds the tax levy void because the men, by whom the levy was made, were corporate authorities, that the electors had no voice in the selecting. Court: "As, already said, the persons to be taxed have never given their assent to this act, and have had no voice in the selection of the members of this corporation. As the object of this constitutional clause was to prevent the legislature from granting the power of local taxation to persons over whom the population to be taxed could exercise no control, it is evident that, by the phrase "corporate authorities" must be understood those municipal officers who are directly elected by such population, or appointed in some mode to which they have given their assent."

*Harward et al. v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill. 130. (R.).

UNSUCCESSFUL ATTACK IN EQUITY UPON APPROPRIATIONS OF  
THE TAX PAYER'S MONEY, OR UPON TAX LEVIES

*Bill to enjoin:* Facts must be stated that will bring case under some acknowledged head of equity.<sup>23</sup>

For mere irregularities in an assessment;<sup>24</sup> or where there is an adequate remedy at law,<sup>25</sup> equity will not enjoin.

23—*Martin v. Barnett et al.*, 188 Ill. 288 (Af.).

24—*Cook v. Chicago, Burlington & Quincy R. R. Co.*, 35 Ill. 460.

25—*Chicago, Bur. & Quincy R. R. Co. v. Frantz*, 22 Ill. 34 (Af.); *Munson, Col. v. Miller*, 66 Ill. 380 (R. R.); *Merritt et al. v. Farris et al.*, 22 Ill. 303 (Af.); *Swinney et al. v. Beard et al.*, 71 Ill. 27 (Af.); *Benrick et al. v. Hall et al.*, 84 Ill. 162 (Af.); *Felsenthal et al. v. Johnson*, 104 Ill. 21 (Af.); *Felsenthal et al. v. Johnson, Col.*, 108 Ill.

11 (Af.); *Keigwin et al. v. Drainage Com'rs*, 115 Ill. 347 (Af.); *Williams v. Dutton*, 184 Ill. 608 (R.); *White v. Raymond, Treas.*, 188 Ill. 298 (Af.); *Booth & Co. v. Raymond Co., Treas.*, 191 Ill. 351 (Af.); *Shriver v. McGregor*, 224 Ill. 397 (Af.); *Gage et al. v. Evans, Col.*, 90 Ill. 569 (Af.); *Reynolds et al. v. Drainage Dist.*, 134 Ill. 268 (Af.); *Munson v. Minor*, 22 Ill. 594 (Af.); *McBride v. Chicago, City of*, 22 Ill. 574 (Af.); *Metz et al. v. Anderson et al.*, 23 Ill. 463 (R. R.);

*The general rule followed is:* "While (Cook, County of, et al. v. C. B. & Q. R. Co., 35 Ill. 466) we consider it settled that a court of equity will never entertain a bill to restrain the collection of a tax except in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, this court has never held that it would take jurisdiction in such excepted cases without special circumstances showing that the collection of the tax would be likely to produce irreparable injury or cause a multiplicity of suits." In Johnson case, 108 Ill. 11, there is added the exception: "or where the assessment has been made without legal authority, or fraud has intervened."

*Residents in a city liable to be taxed for roads beyond limits of city.*<sup>26</sup>

*Capital stock and franchises are liable to be assessed.*<sup>27</sup>

Ottawa, City of v. Chicago & R. I. R. R. Co., 25 Ill. 43 (R. R.); Peoria, City of v. Kidder, 26 Ill. 351 (R.); Porter et al. v. Rockford, Rock Island & St. L. R. R. Co., 76 Ill. 561 (R. R.); Republic Life Ins. Co. v. Pollard et al., 75 Ill. 292 (Af.); Adsit v. Lieb et al., 76 Ill. 198 (Af.); Archer et al. v. Terre Haute & Ind. R. R. Co., 102 Ill. 493 (R.); Morrell v. Union Drainage Dist., 118 Ill. 139 (Af.); Camp v. Simpson, 118 Ill. 224 (Af.); N. Y. & Chi. G. & S. Exchange v. Gleason, 121 Ill. 502 (Af.); Bodman v. Lake Fork Spec. Drainage Dist., 132 Ill. 439 (Af.); Ill. & St. L. R. R. & Coal Co. v. Stookey, 122 Ill. 358 (Af.); Heinrich et al. v. Kochersperger, 173 Ill. 205 (Af.); New Haven Clock Co. v. Kochersperger et al., 175 Ill. 383 (Af.); Field v. Western Spring, Village of, 181 Ill. 186 (Af.); Ayers v. Widmayer, 188 Ill. 121 (Af.); Coxe Bros. & Co. v. Salo-

mon, Col., 188 Ill. 571 (Af.); Martin v. Barnett et al., 188 Ill. 238 (Af.); Siegfried v. Raymond Co., Treas., 190 Ill. 424 (Af.); Lyman v. Chicago, City of, 211 Ill. 209 (Af.); Correll v. Smith et al., 231 Ill. 149 (Af.); Neal Institute Co. v. County Treas., Appellee, 281 Ill. 526 (Af.); Humphreys et al. v. Nelson, 115 Ill. 45 (Af.); Kedzie v. West Chicago Park Com'rs, 114 Ill. 280 (Af.); McCormick v. Park Com'rs, 150 Ill. 516 (Af.).

26—O'Kane v. Treat et al., 25 Ill. 557 (R.); Pleasant, Town of v. Kost, 29 Ill. 490 (Af.).

27—Porter et al. v. R. I. & St. Louis R. R. Co., 76 Ill. 561 (R. R.); Republic Life Ins. Co. v. Pollar et al., 75 Ill. 292 (Af.); Ottawa Gas Light & Coke Co. v. Downey, 127 Ill. 201 (Af.); La Salle & Peru Horse & Dummy Co. v. Donoghue, Col., 127 Ill. 27 (Af.); Evanston Illuminating Co. v. Kochersperger, 175 Ill. 26 (Af.).

*Corporate property liable to be assessed; capital stock; franchise and personal property.* In *Ottawa Glass Company v. McCaleb*, County Clerk, 81 Ill. 556 (Af.), the court below dismissed the bill, saying: "The officers of the company, conceiving the valuation of the capital stock and franchise against the company to be unauthorized and oppressive, filed this bill to enjoin and restrain the county clerk from extending the tax against the valuation of the collector's book." The case was disposed of on demurrer to the bill. Further the court says: "But it has been held, that a corporation is possessed of three kinds of property subject to taxation: First, the capital stock; second, the corporate property; third, the franchise; and the shares may be assessed against their owners. But the very fact that it grants rights, privileges, and exemptions not enjoyed by individuals generally, makes it desirable and gives it value. The length of time the corporation may exist, the business to which it relates, its location and variety of other circumstances, all, of course, enter into the value of the privilege, and should be considered in ascertaining its value. But that it has a taxable value, we entertain no doubt. And if it is property and has value, it, under the constitution, is not only liable to be taxed, but is required to be, in some appropriate mode."

The point was made that the value of the franchise had been put too high by the board. To this the court reply: "The valuation of property is conferred upon, and is solely intrusted by the organic law to another and different class of individuals and officers than those connected with the judicial department of the government." 28

28—*Pacific Hotel v. Lieb et al.*, 83 Ill. 602 (Af.); *Hopkins, Receiver v. Taylor et al.*, 87 Ill. 436 (Af.); *Danville Lumber & Mfg. Co. v. Parks*, 88 Ill. 463 (Af.); *St. Louis*,

*Vandalia & Terre Haute R. R. Co. v. Surrell*, 88 Ill. 535 (Af.); *Coal Run Co. v. Finlen*, 124 Ill. 666 (Af.); *Sterling Gas Co. v. Higby*, Col., 134 Ill. 557 (Af.); *Loan &*

*No property is exempt from taxation except that named in section 3, article 9 of the constitution.*

*Constitutional questions.* The following cases are important in determining whether the statute under which a tax has been assessed and sought to be collected, is in violation of the constitution.<sup>29</sup>

*Right to organize as a municipal corporation* in pursuance of the statute, under the constitution and issue bonds, sustained.<sup>30</sup>

*Legality of a bond issue* involved, and what a corporate purpose is.<sup>31</sup>

*Appropriation ordinance.* Point whether ordinance was passed within "first quarter of the fiscal year." Construction of statute and ordinance.<sup>32</sup>

*Corporate purpose.* Money advanced by an individual for the public welfare cannot be recovered by taxation under the guise of a "corporate purpose."<sup>33</sup>

*Bill to restrain appellee* from issuing \$2,500,000 of bonds under an ordinance.<sup>34</sup>

*The statute* (R. S. 1874, p. 958, sec. 39) allowing the use of school house "for religious meetings and Sunday schools" is not unconstitutional. So held on demurrer to bill seeking an injunction against the directors.<sup>35</sup>

*The control of tax levies a modern exercise of equity power.*

Homestead Assoc. of Joliet v. Keith, 153 Ill. 609 (Af.).

29—Taylor v. Thompson et al., 42 Ill. 11 (Af.); McVeagh v. Chicago, City of, 49 Ill. 318 (Af.); C. D. & V. R. R. Co. et al. v. Smith, 62 Ill. 268 (R. R.); DuPage County v. Jenks et al., 65 Ill. 274 (R. R.); Decker et al. v. Hughes et al., 68 Ill. 33 (Af.); Coal Run Co. v. Finlen, 124 Ill. 666 (Af.).

30—Wilson v. Board of Trustees of Sanitary Dist. of Chicago et al., 133 Ill. 443 (Af.).

31—Stone v. Chicago, City of, et al., 207 Ill. 492 (Af.).

32—Kucera v. West Chicago Park Com'rs, 221 Ill. 488 (Af.); King v. Chicago, City of, 111 Ill. 63 (Af.).

33—Johnson et al. v. Campbell et al., 49 Ill. 316 (R. R.).

34—Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404 (Af.).

35—Nichols v. School Directors, 93 Ill. 61 (Af.).

In this case a bill was filed by one town against another to restrain the collection of a tax but really to determine whether one of the towns was legally organized. The court in holding that one municipality could not enjoin the collection of a tax levy by another, observed: "Until a comparatively recent date, chancery never took jurisdiction to restrain the collection of taxes, hence such power has not found a place in works on equity jurisdiction, and its exercise is only in cases where the officers exceed their power and levy where they can, under the law, levy no such tax because the tax is not authorized by law; or where the persons attempting to make the levy are not officers de jure or de facto; or where the tax is levied upon property wholly exempt; or where the law under which it is levied violates the rule of uniformity and is therefore unconstitutional." <sup>36</sup>

*The power of equity is restricted* to enjoining the enforcement of ordinances, by-laws, resolutions and orders rather than enjoining their passage. <sup>37</sup>

*Assessor and Board of Equalization.* In the absence of fraud the assessor's judgment with reference to the facts, or that of the Board of Equalization cannot be controlled in equity by bill. <sup>38</sup>

*Collateral attack* when there is jurisdiction of the person and the subject matter in the proceeding to collect the tax, equity will not enjoin the taking out of a tax deed. <sup>39</sup>

*A confirmation judgment* in a special assessment pro-

36—Nunda, Village of v. Crystal Lake, Village of, 79 Ill. 311 (R. R.).

37—Stevens et al. v. St. Mary's Training School et al., 114 Ill. 336 (Af.).

Examine for points involved: Lemont v. Singer & Talcott Stone Co., 98 Ill. 94 (R. R.).

38—Traders Insurance Co. v. Farwell Col., 102 Ill. 413 (Af.);

Coal Run Co. v. Finlen, 124 Ill. 666 (Af.); Ill. & St. Louis R. R. & Coal Co. et al. v. Stookey, Col., 122 Ill. 358 (Af.); Weber v. Town Collector et al., 208 Ill. 209 (Af.); Beidler v. Kochersperger, Treas., 171 Ill. 563 (Af.).

39—Warren v. Cook et al., 116 Ill. 199 (Af.).

ceeding, although the city council may have found that a "general system of water works is a local improvement," as an erroneous exercise of power, not subject to attack in equity.<sup>40</sup>

*Bill disposed of on demurrer.* Bill sought to enjoin the collection of a tax on the ground of an illegal assessment of personalty. Facts, showing as equitable excuse for not seeking relief before board of review, not averred. Held error not to sustain the demurrer and dismiss the bill.<sup>41</sup>

*Bill to restrain the collection of a school tax.* Bill dismissed on demurrer. Examine the opinion for what are necessary averments in a bill, what presumptions will be indulged in favor of the acts of officials, and as to what acts of the school board are directory and not jurisdictional.<sup>42</sup>

*Without giving notice to the owner,* an assessor can list and assess property found by him. Equity will not enjoin a tax resting upon the said assessed property, when the tax payer omitted to list it.<sup>43</sup>

*Board of review's right to assess and list credits omitted from former years.* "Credits" are personal property under Section 276, Revenue Act of 1874, and under the revenue amendment to the act (1898) may be assessed by the board of review.<sup>44</sup>

If the board of review has jurisdiction of the parties its increase of an assessment, when no fraud is shown will not be enjoined. Appellant having had notice to appear.<sup>45</sup>

The board of review changed or raised an assessment.

40—Hewes v. Glos et al., 170 Ill. 436 (Af.).

41—Johnson, Col. v. Roberts, 102 Ill. 655 (R. R.).

42—Lawrence v. Traner, 136 Ill. 474 (R. & A.).

43—Morris et al. v. Jones, Col., 150 Ill. 542 (Af.).

44—Sellars v. Barrett et al., 185 Ill. 466 (R. R.).

45—Earl & Wilson v. Raymond, County Treas., 188 Ill. 15 (Af.).

The bill failed for lack of essential averments and evidence.<sup>46</sup>

*Board of review's decision on facts res adjudicata.* A party who claimed that the assessor did not furnish him with a printed blank schedule, as required by statute, and that the assessor did not appraise his property at its fair cash value, appeared before the board of review and submitted the facts to said board. Held, that as there were no charges of fraud in the bill, equity would not enjoin.<sup>47</sup>

#### SPECIAL ASSESSMENTS

Bill in chancery by Henry J. Hewes to have certain assessment proceedings, judgment and sale set aside, and enjoin the clerk from issuing deeds to purchasers. The village of Winnetka in 1892 passed an ordinance for the construction by special assessment of a system of water works for domestic use and for fire protection.

The claim was made that the ordinance was void because the improvement was not a local one. The court held that the act of the city council in passing the ordinance was an erroneous, though not a void exercise of power, subject only to successful direct attack. Court: "But while the decision of corporate authorities is subject to review, it cannot be said that the ordinance is absolutely void, so that no right can grow up under it and that the court cannot obtain jurisdiction by a petition filed in pursuance of it. It has not been held that such an ordinance as this is absolutely void in its character, so that a judgment of confirmation can be attacked collaterally, and all the cases have been where the question was raised in a direct proceeding on a review of the judgment. The term "void" has been used indiscriminately and those cases as applied to ordinances which

46—Weber v. Baird, 208 Ill. 209 (Af.).

Burton Stock Car Co. v. Traeger et al., 187 Ill. 9 (Af.).

47—Chi. & Mtl. El. R. R. Co. v. Vellman et al., 213 Ill. 609 (Af.).

are nullities, and those which may be avoided as unreasonable or an improper exercise of authority. An ordinance may be unreasonable in its provisions although dealing with a subject concerning which the municipal authorities have power to legislate, and such ordinances have been termed void; but that is so only in the sense that their unreasonable character is a good defense against their enforcement. The statute furnishes no definition of a local improvement, and the determination of that question in a particular instance is left, in the first place, to the corporate authorities, but they must act reasonably and without fraud, or their action will be invalid.”<sup>48</sup>

An attempt was made to enjoin the collection of a special assessment levied by the commissioners of a drainage district. The bill alleged ownership of the lands; that the lands had been connected with the district without any authority; no notice was given the land owners that any steps would be taken to enlarge the boundaries of the district; no benefits would be derived from the assessment, etc.

Section 42, Act of 1885, p. 90, provided for the enlargement of drainage districts. It was shown in evidence in defense to the bill that the commissioners had acted under this section.

The court, after a review of the authorities (75 Ill. 562; 91 id. 179; 103 id. 226; 109 id. 508) observes: “Under the rule established in the cases cited, it is a plain proposition that the legality of the organization of the district in question cannot be called in question by bill in equity. \* \* \* If the boundaries of the district were not lawfully extended, and the drainage commissioners undertake to exercise powers or franchises over or upon lands not lawfully within the bounds of the district, their

48—Hewes v. Glos et al., 170 Ill.  
436 (Decree dismissing bill).



right or authority to act as to these lands may be called in question by *quo warranto*; but a bill to enjoin the collection of the assessment is not the proper remedy.”<sup>49</sup>

An attack, through the medium of a bill in equity was made upon a judgment confirming paving and sewer assessments, spread upon lots that did not abut upon the streets to be improved; and for the further reasons that notice of the contents of the respective assessment rolls had not been given as required by section 19 of the Act of 1897; that the lots were not shown on a plat filed with the assessment rolls and that the statutory provision for giving notice to the party paying the taxes instead of the owner of the lots was unconstitutional.

It was held that it was not essential that property assessed “should be contiguous to, or abutting upon the improvement—it is sufficient that the property be presently specially benefited;” and that under the allegations of the bill the property owner was not in a position to have the other questions reviewed.<sup>50</sup>

A judgment that confirmed an assessment “to pay the cost of grading, curbing and paving certain streets” was assailed as void for the reason that the petition of the property owners, that had awakened the action of the improvement board, had been devitalized by use upon a former occasion.

On a direct attack by a property owner it was held (*Vennum v. Milford, Village of*, 202 Ill. 423), that no authority could thereby be conferred upon the improvement board and the judgment was void.

In holding that equity would not enjoin the collection of that assessment in response to a bill, by property owners who had made no direct attack upon the assessment roll, the court observes: “Complainants do not attack the judgment on account of any want of notice or

49—*Evans et al. v. Lewis et al.*,  
121 Ill. 478 (Af.).

50—*Roberts v. Evanston, City of*,  
et al., 218 Ill. 296 (Af.).

want of jurisdiction of their person or allege that notice was not given, but their claim is that the court acquired no jurisdiction because the petition presented to the board of local improvements had lost its vitality by the prior use made of it. The only question then is whether the county court had jurisdiction of the subject matter. If it did and the defendants failed to make the defense that the petition had been previously used, and make proof of such fact, they cannot now invoke the aid of a court of equity on account of their neglect." 51

51—Sumner v. Milford, Village and Hangen v. Chicago, City of, 259 of, 214 Ill. 388 (Af.) and Martin Ill. 249 (Af.).  
et al. v. McCall, 247 Ill. 484 (Af.),

## CHAPTER XVI

### APPEARANCE: EFFECT OF IN STATUTORY PROCEEDINGS

Parties, who appear and file general objections against the confirmation of the assessment roll, thereby waive any defects in the notice under which they make their appearance.<sup>1</sup>

A general appearance is not, however, a waiver of any question that relates to jurisdiction of the subject matter. Under a general appearance an objection was made "that the estimate of the cost of the improvement made by the engineer was not made a part of the record of the first resolution." This objection was overruled. In the supreme court it was contended that this ruling of the county court could not be reviewed because not made under a special appearance. In reversing, the court observes: "This objection is one which challenges the power of the court to proceed for the reason that certain preliminary proceedings were so defective that the court did not obtain jurisdiction of the subject matter, and an objection of this character is not waived by a general appearance."<sup>2</sup>

On an application by the county collector for judgment of sale against delinquent land, unless the property

1—*Murphy v. Peoria, City of*, 119 Ill. 509 (R. & Af.); and *Walters v. Lake, Town of*, 123 Ill. 23 (Af.); *Quick v. River Forest, Village of*, 130 Ill. 323 (Af.); *White et al. v. Alton, City of*, 149 Ill. 626 (Af.); *Haley et al. v. Alton, City of*, 152 Ill. 113 (Af.); *Porter v. Chicago, City of*, 176 Ill. 605 (Af.); *Hintz et al. v. Elgin, City of*, 186 Ill. 251 (Af.).

2—*Chicago Union Traction Co. v. Chicago, City of*, 209 Ill. 444 (R. R.).

owner limits his appearance specially, and confines his objections to those only that question the validity of the notice given by the collector, the contest will be confined to the merits of the tax proceeding.<sup>3</sup>

3—People ex rel. v. Sherman et al., 83 Ill. 165 (R. R.); and Hale v. People ex rel., 87 Ill. 72 (Af.); Mix v. People ex rel., 106 Ill. 425 (Af.); Ziegler v. People ex rel., 164 Ill. 531 (Af.); Nicholas v. People ex rel., 165 Ill. 502 (Af.); McChesney v. People ex rel., 176 Ill. 542 (Af.).

## CHAPTER XVII

### SPECIAL ASSESSMENTS

#### DIRECT ATTACK : SUCCESSFUL

The Constitution of 1818 contained the following limitations upon legislative power: First, "That no free man shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."<sup>1</sup>

Second. "Nor shall any man's property be taken or applied to public use without the consent of his representatives in the general assembly, nor without just compensation being made to him."<sup>2</sup>

Third. "That the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession."<sup>3</sup>

Fourth. The Constitution of 1848 contained the same limitations<sup>4</sup> but made the following change in reference to the valuation of property: "Such value to be ascertained by some person or persons to be elected or appointed in such manner, as the general assembly shall direct, and not otherwise."<sup>5</sup>

The Constitution of 1848 further limited the legisla-

1—Sec. 8, Art. 8, Constitution of 1818.

2—Sec. 11, Art. 8, Constitution of 1818.

3—Sec. 20, Art. 8, Constitution of 1818.

4—Secs. 8 and 11, Art. 13, Constitution of 1848.

5—Sec. 2, Art. 9, Constitution of 1848.

tive power by enacting: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."<sup>6</sup>

The Constitution of 1870 changed materially the limitation clauses of the two prior constitutions.

First. "No person shall be deprived of life, liberty or property, without due process of law."<sup>7</sup>

Second. "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken."<sup>8</sup>

Third. "The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation."<sup>9</sup>

Fourth. "The general assembly may vest the corpo-

6—Sec. 5, Art. 9, Constitution of 1848.

7—Sec. 2, Art. 2, Constitution of 1870.

8—Sec. 13, Art. 2, Constitution of 1870.

9—Sec. 10, Art. 9, Constitution of 1870.

rate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.”<sup>10</sup>

Fifth. “The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise.”<sup>11</sup>

Sixth. “The general assembly may pass laws permitting the owners or occupants of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby.”<sup>12</sup>

(This section was submitted to the voters at the election in November, 1878, as an amendment, was adopted and became a part of the constitution.)

These are the barriers that the successive constitutions have erected to protect the citizen in his holdings of real estate.

Under the Constitutions of 1818 and 1848 began the struggle, which still continues, between individual land

10—Sec. 9, Art. 9, Constitution of 1870.

11—Sec. 1, Art. 9, Constitution of 1870.

12—Sec. 31, Art. 4, Constitution of 1870.

holders and the representatives of the public with reference to the amount of taxes for the support of the general government, and the amount of special assessments for the improvement of certain localities in a municipality that can, under the constitution be made a lien on real estate of the individual, that requires payment, or a sale and forfeiture of the land.

The legislative provisions for determining the value of real property and the method of spreading taxes thereon, with some variation in detail, have remained the same under all the constitutions.

The fundamental principal, under which general taxes are spread upon land and collected from the individual, is "equality and uniformity." The application of this principle has not occasioned a great deal of friction between the legislative and the judicial departments of the government.

The fundamental principle, under which special assessments are fastened upon the land of the individual in a definitely defined locality, is "equality of benefit." The field of benefit must be co-extensive with the field of assessment. Of the whole number of tracts of land, none can be assessed more than they will be specially benefited by the contemplated improvement.

The attempt of municipalities to apply this principle through and by the statutory machinery, that has been furnished from time to time, has brought the legislative and judicial departments of government into frequent, and the owners of land and the public into more frequent collision.

Under the first two constitutions, it was the custom of the legislature to empower city councils to appoint three men to inquire into the necessity of a public improvement, the amount of benefit assessed lands would be likely to receive from the improvement, and any damages thereby to land owners by necessary condemnations.



These three men, sometimes called "commissioners" or "board of public works," were required to make a report embodying their findings upon these several subjects to the city council, and to give notice to the land owners of the time when a hearing would be had before said city council upon the report to the end that any objections desired by land owners might be made. If the report of the commissioners was confirmed by the city council, it was regarded as an adjudication as to benefits bestowed and damages inflicted, between the land owner and the public, and became the basis of a warrant for the collection of whatever amount was therein charged against the land made liable for the cost of the improvement. A failure to pay the warrant within a specified time would result in a sale of the land and a forfeiture of title thereto.

This method of adjudicating the rights of the freeholder at first (1859) met the sanction of the supreme court <sup>13</sup> and property owners acquiesced until 1864 <sup>14</sup> and 1871 <sup>15</sup> when the acts of the legislature, vesting city councils, through the instrumentality of three men, with power to assess land "on the basis of the frontage of the lots upon the street to be improved" and to fix and determine the compensation to be paid the citizen for a condemnation of his land, were successfully assailed as unconstitutional.<sup>16</sup>

The principle determined in the Larned case was: That the right of a municipality, to specially assess lands within its territorial limits, rests upon the sovereign power of eminent domain and is within that limitation clause of the constitution, that prohibits the taking of any man's property "without just compensation." The theory, under which special assessments for

13—Johnson v. Joliet & Chicago R. R. Co., 23 Ill. 202.

14—Chicago, City of v. Larned et al., 34 Ill. 203.

15—Rich et al. v. Chicago, City of, 59 Ill. 286.

16—Chicago, City of v. Larned et al., 34 Ill. 203.

local improvements was sustained, is: With the threatened taking of the land is the tacit promise to render back in benefit to the land an exact equivalent. If the market value of the land is enhanced in an amount equal to the assessment, the constitutional requirement is met, otherwise not. In the language of the supreme court, "assessments must be made in the ratio of advantages or benefits, which would necessarily require that it should be imposed equally upon all property equally benefited, or it would be unlawful."

This principle was re-affirmed in the Rich case and to it was added the principle: The determination of what is "just compensation" is a judicial not a legislative function. For the reason, that a city council is a branch of the legislative department of government, it could not be authorized to adjudicate upon the question: "What is just compensation?"

Prior to the Constitution of 1870, cities and towns were authorized to make improvements, pave and grade streets, and build sidewalks, and assess cost upon the holders of lots by a special tax according to their respective fronts. See Session Laws 1859, page 613, 3 Private Laws 1869, page 666.

By an act of the legislature (1859, Public Laws, page 110) amended in 1865 (2 Private Laws, page 2) five men were therein constituted (appointed by the legislature) a body politic "to levee and drain a certain district defined in the act, and comprising portions of St. Clair and Monroe counties" and to levy a tax, ostensibly for the benefit of the defined territory, against the owners thereof.

Subsequently the circuit court of Monroe County refused to enjoin, in response to a bill filed by the property owners in the district, a tax imposed by these men under the power conferred by this act.

In reversing the lower court the supreme court held: Although the constitutional ratio between benefits be-

stowed and the burdens imposed upon the territory assessed might have been observed, the legislature had transcended the limitation clause of the constitution of 1848 providing: "That the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same (article 9, section 5). As these five men, elected by the legislature and not by the inhabitants of the territory to be taxed, were not corporate authorities of a county, township, school district, city, town or village, they were without authority to lay this tax burden upon the land owners. The supreme court announces its reason for so holding as follows: <sup>17</sup>

"The clause in question was not in the former constitution, and yet the right of the legislature, under that constitution, to vest in municipal corporations the power of taxation for local or corporate purposes, was constantly exercised and never denied or doubted. It is evident, then, this clause was not inserted in the present constitution as a necessary grant of power, or to remove a doubt as to its existence. It is, therefore, a just inference that its purpose was to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised, and when

17—Harward et al. v. St. Clair & Monroe Levee and Drainage Co. et al., 51 Ill. 130 (reversed).

The Lincoln Park Board of Commissioners was established by Act passed Feb. 8th, 1869 (Private Laws 1869, Vol. 1, page 368, South Park Commissioners, Feb. 24, 1869), Private Laws 1869, Vol. 1, page 358. West Park Board, Feb. 27, 1869, Private Laws 1869, Vol. 1, page 342.

"An act to enable park commissioners or park authorities to make local improvements and provide for payment thereof." 1895 Sess. Laws, p. 286. This act held constitutional. West Ch. Park Com. v. Sweet, 167-326; West Ch. Park Com. v. Farber, 171-146; Farr v. West Ch. P. Com., 167-355; Cummings & Co. v. P., 213-443; Van Nada v. Goedde et al., 263 Ill. 105.

the legislature seeks to grant it to any other than corporate authorities, or for corporate purposes, it transgresses the limit of its power. If the clause in question was not designed as a limitation of power, no reason can be given why it was inserted in the constitution at all."

It was further held that these five men were powerless to assess and collect the tax because the land owners had had no choice in their selection. Section 12, article 4 of the Constitution of 1848, forbade the legislature to "appoint or elect" men to office.

In support of the court's position it is further said: "This construction of the constitution is decisive against the validity of the tax under consideration, for it cannot be, and is not claimed, that this drainage incorporation, or the persons who compose it, are the corporate authorities, in any sense, of the district over which the act in question seeks to give them the power of taxation. As already said, the persons to be taxed have never given their assent to this act, and have had no voice in the selection of the members of this corporation. As the object of this constitutional clause was to prevent the legislature from granting the power of local taxation to persons over whom the population to be taxed could exercise no control, it is evident that, by the phrase 'corporate authorities,' must be understood those municipal officers who are either directly elected by such population, or appointed in some mode to which they have given their assent."

#### PARK ACTS

In anticipation of and to meet the position taken in the Harward case by the supreme court under the Constitution of 1848 the legislature in several acts passed in 1869 for the purpose of establishing public parks within a prescribed and definite territory less than a county, township, school district, city town or village, made pro-

vision for submitting to the inhabitants in the territory whether a park should be organized. These acts provided for the appointment of five men to be the corporate authorities of the organization, and to have power to levy and assess taxes and purchase land, but their acts did not become conclusive and binding upon the inhabitants of the territory until they had been reported and confirmed by the circuit court.

To meet the position taken by the supreme court that the constitutional principle of equality (sec. 5, art. 9, Con. 1848) applied to the spreading of special assessments, as well as general taxation "the restrictive provision of uniformity in all municipal taxation" was omitted from the Constitution of 1870 and for it was substituted:

"The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise."<sup>18</sup>

In construing this clause of the constitution, it was held that a special assessment for improving a street might be limited to contiguous property, though other property was benefited.<sup>19</sup> It was also held that a special assessment, for opening and extending a street, might be spread co-extensive with benefit bestowed, regardless of the question of whether it was contiguous or not.<sup>20</sup>

An ordinance directed that the cost of paving intersecting streets and alleys be paid by general taxation, the cost of paving the portion of the streets occupied by railways be paid by the owners of such railways and that the balance of the expense be paid by levying a special tax upon abutting lots.

On behalf of the property owners, it was contended that this method of assessment was unconstitutional.

18—Art. 9, Sec. 6.

20—Guild, Jr. v. Chicago, City of,

19—Lake et al. v. Decatur, City  
of, 91 Ill. 596 (Af.).

82 Ill. 472 (Af.).

The court in answer admit that it would have been under the Constitution of 1848, but that a change of rule is authorized under the Constitution of 1870.<sup>21</sup>

AN ACT TO PROVIDE FOR THE CONSTRUCTION AND PROTECTION  
OF DRAINS, DITCHES, LEVEES AND OTHER WORKS,  
APPROVED, APRIL 24, 1871

Under this act a levee district was organized and a tax was imposed upon the land owners in the district. A bill was filed to enjoin the collection of the tax. It was sought to defend the tax levy under that clause of the Constitution of 1870 which declares "the general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others," article 4, section 31. It was held that this organization was invalid for the same reason that the organization in the *Harward case* was invalid. It was another attempt to impose a special assessment upon a locality without the consent of the tax payers to be affected.<sup>22</sup>

The holding of the supreme court, in *Harvard et al. v. St. Clair & Monroe Levee and Drainage Co.*, 51 Ill. 130, *Udike v. Wright*, 81 Ill. 49, and *Blake v. People*, use, etc., 109 Ill. 504, led (*Com. Sny. Island Levee Drainage Dis. v. Shaw*, 252 Ill. 142) to the amendment of section 31, article 4, Constitution 1870 (adopted by vote of the People in 1870), the passage in 1885 (*Ses. Laws*, p. 60) of an act to vest the corporate authorities of cities

21—*Springfield, City of, v. Green et al.*, 120 Ill. 269 (R. R.).

Sept. 2, 1872, the common council of the City of Chicago adopted by ordinance Art. 9 of "An act to provide for the incorporation of cities and villages." *Laws 1872*, p. 218.

The question for a jury is:

Whether the property is assessed more or less than it will be benefited or more than its proportionate share of the whole cost of the improvement.

22—*Udike v. Wright*, 81 Ill. 49 (Af.).

and villages with power to construct drains, ditches, etc., and erecting pumping works, and in 1889 to the passage of an act to create sanitary districts, and to remove obstructions in the Des Plaines and Illinois rivers (Ses. Laws, p. 125).

The validity of the first act was called in question and sustained under section 31, article 4, Constitution of 1870, in *Hyde Park, Village of*, 118 Ill. 446. In *Gray et al. v. Cicero, Town of*, 177 Ill. 59, it was held that the Act of 1895 did not repeal by implication article 9, Act of 1872, granting power to cities and villages to make local improvements.

In *Rich et al. v. Chicago, City of*, 152 Ill. 18, it was held that the Act of 1889 did not repeal the Act of 1885. And in *Chicago, City of v. Cicero, Town of*, 210 Ill. 290, the constitutionality of section 26 of the Act of 1889 was questioned and sustained.

In *City of Chicago, Appellee v. Green*, 238 Ill. 258, it was held that the Sanitary Act of 1889 was not intended to deprive municipalities, within its area, of power to construct sewers by special assessment, but only to provide for constructing an outlet for all sewers tributary to the outlet sewer.

In *Brookfield, Appellant v. Papst et al.*, 235 Ill. 355, it was held that the Act of 1899 (Ses. Laws, p. 96), does not apply to villages.

Section 31, article 4, of the Constitution of 1870, as originally adopted was as follows:

The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others.

The amendment adopted in 1878 added: Provide for the organization of drainage districts and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees, heretofore constructed

under the laws of this state, by special assessment upon the property benefited thereby.

The holding of the supreme court in the *Urdike case* and the amendment to the constitution in 1878 led to the passage by the legislature in 1879 of two separate drainage acts, known respectively as "The Levee Act" and the "Farm Act."<sup>23</sup> (See Chapter 24 where authorities under Levee Act and the Farm Drainage Act are grouped for examination.)

In Spring Creek Drainage District, Appellee v. Elgin, Joliet & Eastern Railway Co. et al., 249 Ill. 260, it was held, under the amendment of 1878 to the Constitution of 1870, that a street railway company was liable to special assessment by a drainage district.

While it is held under the Constitution of 1870 that the power to make local improvements by special assessment and special taxation does not rest upon the constitutional provision for exercising the right of eminent domain, but is a branch of the taxing power, the element of benefit to the property enters into the question of its validity. *C. & A. R. Co. v. Joliet*, 153-649.

The supreme court speaking by Mr. Justice Magruder says, after referring to the *Larned case*: "But it has been held, that under the present constitution, special taxation of contiguous property and special assessments for local improvements must be regarded as branches of the taxing power. They are regarded as species of taxation, not as impositions for the purpose of revenue, but as charges inseparably incident to the location of the property assessed with respect to other property. Special taxes for local improvements, not being levied

23—*Gauen et al. v. Moredock and Ivy Landing Drainage Dis.*, 131 Ill. 446.

See *Gobe et al., Appellees v. Chicago, City of*, 246 Ill. 625, where it is held that the county court under

Sec. 53, Act of 1897, has no power to determine the title to land as between the petitioning municipality and one who owns, or claims to own, the land upon which a street sidewalk is sought to be imposed.



for revenue to support the government, but being justified only on the ground that the subject of the tax receives an equivalent, are not included in exemptions from general taxation, although they partake of the nature of taxes." Citing the *White Case*, 94-602. *Adams v. Quincy*, 130 Ill. 566, and *Bloomington v. Latham*, 142 Ill. 462.

## SIDEWALK ACT OF 1875

In 1875 the legislature passed an act to provide additional means for the construction of sidewalks in cities and villages.

In this act there was a provision for levying the whole or any part of the cost of building a sidewalk "upon each of the lots or parcels of land touching upon the line of such sidewalk" by special taxation.

In 1878 the City Council of Bloomington adopted an ordinance for building a sidewalk, the whole cost of which was to be levied upon the lots abutting in proportion to their frontage. It was contended in behalf of the owner of a lot abutting upon the proposed sidewalk: That the law was unconstitutional and that the property was not benefited to the extent of the cost.

In sustaining this statutory enactment the court abandons the position taken in the *Larned case*, and says: "It is quite clear that the levying such local assessment (for the building of sewers and sidewalks) is not taking private property for public use under the right of eminent domain, but is the exercise of the right of taxation, inherent in every sovereign state."

In further support of this statute the court observes: "We find the phrase 'special taxation' introduced for the first time in the Constitution of 1870. There is nothing there defining its meaning. If we may resort to former legislation of the state, as it is used there for its meaning, we shall find it to embrace the precise kind of

tax which is here in question. For instance, the charter of the City of Alton (Laws 1833, p. 208, sec. 6) contains this provision: 'It shall be lawful for the board of trustees to levy and collect a special tax on the owners of lots on said street or part of a street, according to their respective fronts, for the purpose of grading and paving the sidewalks in said street.'

"The provision that these local improvements may be made by special taxation of contiguous property, but for all other corporate purposes taxation shall be uniform in respect to persons and property within the jurisdiction of the body imposing the tax, excludes all idea that for the making of such local improvements every person shall pay a tax in proportion to the value of his property, and that general requirement found in section one is modified by section nine, that the corporate authorities of cities, towns and villages may be vested with power to make local improvements by special taxation of contiguous property, or otherwise, and does not apply in such case. The whole constitution must be taken together.

"Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based upon a presumed equivalent. The city council has determined the frontage to be the proper measure of probable benefit." <sup>24</sup>

The City Council of Galesburg on May 5, 1884, passed an ordinance providing for the construction of a sewer, one half to be paid by general taxation and the other half by special tax. With section 9, article 9, of the constitution before it, the court again observes:

"The notion seems to be advanced by counsel that special taxation implies the idea of special benefit, and that there can be no special taxation of property unless,

<sup>24</sup>—White v. People ex rel., 94 Ill. 604 (Af.).

and according as, it may be specially benefited. There is no countenance for this. The power of special taxation is given unqualifiedly with no restriction as to benefiting contiguous property.”<sup>25</sup>

The City of Springfield imposed by ordinance the cost of a street improvement upon abutting property. This imposition was sustained as not in violation of the Constitution of 1870.<sup>26</sup> Again the same city in 1885 by ordinance directed that the cost of improving certain alleys and street intersections should be paid by general taxation and by special tax upon the lots abutting upon the street according to front foot. It was contended that this method of providing for the cost of a street improvement was unconstitutional, but the court declares that former decisions have settled the doctrine adversely to the contention of counsel.<sup>27</sup>

#### LOCAL ASSESSMENTS

To meet the constitutional objection that had been found to the machinery contained in special charters for originating and completing local improvements, article 9, was inserted in “an act to provide for the incorporation of cities and villages” (Chap. 24, p. 232, R. S. 1874).

Under this new enactment, the city council could originate a local improvement, but for the final adjudication of all property rights, between the land owner and the public represented in the municipality, the county court was substituted.

In 1897 the legislature passed “an act concerning local improvements” (Sess. Laws 1897, p. 101), modeling the machinery for originating and completing local improvements more nearly like what was provided in

25—*Galesburg, City of v. Searles et al.*, 114 Ill. 217 (R. R.).

26—*Enos et al. v. Springfield, City of*, 113 Ill. 65 (Af.).

27—*Wilbur et al v. Springfield, City of*, 123 Ill. 395 (Af.).

chapters 6, 7, 8 and 9 of the Act of 1863. (Amended Charter of the City of Chicago, pp. 82-108.)

Under the enactment of 1897 the authority to originate a local improvement was vested in certain municipal officers (mayor, commissioner of public works, superintendent of streets, president of town or village, city engineer, etc.) who are called "board of local improvements," with the right to adjudicate between property owner and the public still left in the county court; and only the perfunctory duty, of passing an ordinance, conceived and drafted by the local board, left to the city council.

In 1900 an unsuccessful attack was made upon this act on the ground that it violated section 9, article 9, of the constitution by attempting to "vest power in the board of local improvements to make such improvements by special assessment, etc.," while under the constitution only the "corporate authorities" could be vested with such power.

In sustaining the enactment the court held: "The act is not unconstitutional simply because it provides for the creation of such a board and commits to it certain preliminary work, mainly in the line of ascertaining the facts necessary for the council to know before determining whether or not to provide for the making of the improvement and the levying of the assessment or special tax. An ordinance, duly adopted, lies at the foundation of the proceeding, and the board is not vested with any power to adopt an ordinance."<sup>28</sup>

After a confirmation judgment was entered by default the property owner appeared and made a motion to vacate the judgment upon the ground, among others, that the legislature had no power to provide for the

28—Givins et al. v. Chicago, City of, 180 Ill. 348 (Af.).

appointment of a superintendent to apportion costs between the city and the property specially benefited.

In sustaining the constitutionality of the act, the supreme court observes:

"The method of spreading and collecting special assessments for making local improvements provided for in the Local Improvement Act of 1897 is substantially the method which for many years has been and is still in force in this state, and many miles of local improvements, involving the expenditure of many thousands of dollars, have been constructed and paid for under the Act of 1897 and previous acts of the legislature, and the method provided in said statutes has been followed so long and recognized in so many ways as valid by the courts of this state, that the Act of 1897 should not be now held unconstitutional unless such result necessarily follows from a correct interpretation of the constitution. The right to spread a special assessment through a commissioner not a member of the city council or board of trustees and the power of the county court to act in special assessment proceedings are fully recognized in *Lake v. Decatur, City of*, 91 Ill. 596, and it has generally been held that any statutory notice to the property owner which will enable him to appear before some duly constituted tribunal, where he may be heard with reference to the fairness and the validity of the assessment before it becomes a fixed and established charge upon his property, is a sufficient notice." <sup>29</sup>

29—*Citizens' Savings Bank and Trust Co. et al. v. Chicago, City of*, 215 Ill. 174 (Af.).

Section 54 (Art. 9, Act of 1872, R. S. 1874, p. 240) provided that cities organized under special charters might by ordinance adopt Article 9. For the relationship between this article, after its adoption, and charter powers, see *Shreve*

*et al. v. Cicero, Town of*, 129 Ill. 226.

For the effect that the Act of 1901, amending thirty-six sections of the Act of 1897 had upon prior modifications of the original sections, see *Melrose Park, Village of, v. Dunnebecke et al.*, 210 Ill. 422 (R. R.).

S. P.—19

MACHINERY FOR LEVYING AND COLLECTING A SPECIAL  
ASSESSMENT

In 1872 (art. 9, chap. 24, R. S. 1874) the legislature provided the machinery for conducting through the courts proceedings to establish local improvements. The power was conferred upon cities in the very words of the constitution.

In construing this section, it is held (sec. 116, art. 9, page 232) that, in making an improvement, special assessment and special taxation cannot be combined ( ) but special assessment and general taxation may be combined and so can special taxation be combined with general taxation ( ).

The theory of this statute was to allow the city to take the initiative and give the citizen a right to challenge and have reviewed in the county court what the city had done. Under this statute, before a judgment of confirmation could be rendered upon the act of the city, an opportunity was given the land owner to have every step in the proceeding as searchingly and thoroughly examined by the court as can be done in the case of a declaration or bill in chancery on demurrer.

The first step under the Act of 1872 was: The city council passed an ordinance stating the *nature, character, locality, and description* of the improvement.<sup>30</sup> If the improvement required the taking or damaging of private property, a petition was first filed in a court of record, containing a copy of the ordinance, and giving a description of the land to be taken or damaged. The parties interested were then summoned, as required by the chancery practice. A jury was empaneled, to whom were submitted the questions of fact that arose upon the petition, and on a return of the verdict, judgment was rendered thereon with a right of review.

30—See No. (22) (65).

If, under the ordinance, no land were taken or damaged the city council appointed three men to estimate the probable cost, including labor and material, of the improvement. On the report of the committee, if approved, the city council directed its officers to file a petition in the county court, asking that the cost of the improvement might be assessed upon the lands benefited. The county court thereupon appointed three men to estimate what proportion of the total cost of such improvement would be of benefit to the public, and what proportion would be of benefit to the property to be benefited, and apportion the same between the city or village and the property to be benefited, so that each should bear its equitable proportion. This committee prepared an assessment roll giving the amount of benefit charged to each piece of land and the name of the person paying the taxes upon the land the last preceding year, and filing it in the office of the clerk of the county court. The committee were required to file an affidavit of compliance with the statute, and give written notice to the persons named in the assessment roll of the time when a hearing would be had upon the report before the county court. The statute provided that any party interested might appear in response to the notice and file objections. The statute did not provide any set form of objections, but in practice they were analogous to special pleas interposed to a declaration in law, as any fact not denied or contested in the record, was presumed to be admitted. In the absence of a rule of court requiring them to be specific, objections in general terms were sufficient.<sup>31</sup> In practice, law questions were first raised and considered and later, questions of fact. The former raised questions with reference—to jurisdiction of the

31—Davidson et al. v. Chicago, 178 Ill. 582; Close et al. v. Chicago, City of, 217 Ill. 216 (Af.); Mead et al. v. Chicago, City of, 186 Ill. 54 (Af.); Chicago, City of v. Singer et al., 202 Ill. 75 (R. R.).

subject-matter and jurisdiction of the parties.<sup>32</sup> Under the statute of 1897 (section 48) the provision is: "The court shall first determine all questions relating to the sufficiency of the proceedings, the distribution of the cost of the improvement between the public and the property, and of the benefits between the different parcels of property assessed, together with all other questions arising in such proceeding with the exception" *that the property of the objector will not be benefited to the amount assessed against it, and that said property is assessed more than its proportionate share of the cost of such improvement.*

In support of the rule of informality of objections in special assessment proceedings, reference may be had to *Gage et al. v. Chicago, City of*, 216 Ill. 107, where an objection, among others, was made that there was another proceeding pending for the same improvement. To meet this objection, the city dismissed the prior proceeding and produced a copy of the record of the court showing its discontinuance. To this the reply of the property owner was: under common law pleading "a plea of another suit pending, if proven, abates the second action." The supreme court in sustaining the lower court in overruling the objection, held, it was the intention of the legislature to provide "a complete code governing a proceeding for making a local improvement by special assessment on the property benefited, and the rules of common law pleading are applicable only in the event and to the extent there is an omission in the statute of some regulation or manner of proceeding." Further the court intimated that the property owner, by filing other general objections, had lost the right to have this rule enforced, even if otherwise entitled thereto.

Only objections made in the trial court can be con-

32—*Cody v. Cicero, Town of*, 203 Ill. 322 (Af.).



sidered on review.<sup>33</sup> To secure a review of rulings of the lower court on matters outside the record proper, the evidence must be preserved by a bill of exceptions.<sup>34</sup> It will be error not to allow objections to the merits to be filed after legal objections have been overruled.<sup>35</sup> Permitting additional objections to be filed or permitting amendments to those filed is within the sound discretion of the trial court. The exercise of this discretion, unless abused, will not be disturbed on review.<sup>36</sup>

Jurisdiction of the parties was obtained by giving the notices that were required by the statute, and especially, the notices of the filing of the assessment roll. If it were claimed by the land owner that there had been any defect or omission with reference to the drafting of the notices, and the serving of the same, by entering a special appearance, the validity and regularity of the notice could be determined by the court *in limine*. Under a general appearance, only questions of the jurisdiction of the subject-matter could be considered. If the statutory notices have been given, so that the land owner is bound to appear in court, then the ordinance as the foundation of the whole proceeding is next subject to attack.<sup>37</sup>

#### ORDINANCE

The first essential of the ordinance was to be within the legislative grant of power. Under the constitution cities and villages were vested with power to make local improvements, and in the first instance (see subject:

33—Hunerbery v. Hyde Park, Village of, 130 Ill. 156; Dickey v. City of Chicago, 164 Ill. 37 (Af.).

34—Fisher et al v. Chicago, City of, 213 Ill. 268 (Af.); Close et al. v. Chicago, City of, 217 Ill. 216 (Af.).

35—Doran et al. v. Murphysboro, 225 Ill. 514 (R. R.).

36—Peru v. Bartels et al., 214 Ill. 515.

37—Hunerbery v. Hyde Park, Village of, 130 Ill. 156 (134 No.); Dickey v. City of Chicago, 164 Ill. 37 (Af.).

"Tribunals" whose finding of fact is co-extensive with the finding of fact by a common law jury), the municipality determined upon the necessity and expediency of a local improvement. But "What is a local improvement as contradistinguished from a public improvement?" is the question first decided by the city council. Neither the legislature nor the courts have defined in specific terms what is, and what is not, a local improvement.<sup>38</sup>

The City of Chicago passed an ordinance providing for the levying upon specific property the cost of sprinkling the streets. The supreme court, on reviewing, held that this could not be done within the limited power of the city council, because sprinkling the streets would not enhance the value of the property in any defined and definite areas, but would be, rather, a benefit in which all citizens or the public at large would share.<sup>39</sup> Again it was held that an ordinance that attempted to spread the cost of a water works system upon a limited number of property owners, rather than upon the public at large, was outside the limited power of the city council.<sup>40</sup>

From adjudged cases, the principle can be affirmed that an improvement or benefit which will be diffused more or less throughout the entire limits of the municipality, is not local, and cannot be paid for by special assessment.

On direct attack, it was sufficient to awaken the action of the court upon the validity of the ordinance to characterize it, *first*, defective—or lacking some specific averments required by the statute—as nature, character, location, etc.—of the improvement.<sup>41</sup>

38—Bloomington, City of v. Chicago & Alton R. R. Co., 134 Ill. 451 (Af.); Chicago, City of v. Law et al., 144 Ill. 569 (Af.).

39—Chicago, City of v. Blair, 149 Ill. 310 (Af.).

40—Morgan Park, Village of v. Wiswall et al., 155 Ill. 262 (Af.); Blue Island, Village of v. Eames et al., 155 Ill. 398 (Af.).

41—Sterling, City of v. Galt et al., 117 Ill. 11 (Af.); Hyde Park,

An ordinance must specify the nature, character, locality and description, etc.

An ordinance specifying the termini of a street improvement; the quality, size, finish and manner of setting a curb, material to be used; mode of preparing bed for pavement and its construction, the depth of the paving, manner of finishing, but did not state where curb should be set nor the width of the pavement, was held insufficient to sustain an assessment, and the county court's judgment overruling objection thereto was reversed but not remanded.<sup>42</sup>

In *McChesney v. Chicago, City of*, 171 Ill. 253 (R. R.),<sup>43</sup> the objection to confirming the assessment roll was: That the ordinance did not specify the nature, character, locality and description of the proposed improvement—the laying of a cement sidewalk on Rhodes Avenue. In considering the ordinance, the court held the defect to be: There were no facts stated from which it could be determined whether the sidewalk was to be built next to the curb line or next to the property line, nor was the grade at which it was to be built stated. "All these facts are material in order that the committee appointed to estimate the cost may do so intelligently and with substantial accuracy."

A leading case is *City of Sterling v. Galt*, 117 Ill. 11. The ordinance referred the land owner to the office of the city clerk, where maps and plans descriptive of the improvement could be seen. It was held, that this information must be in the ordinance. To meet the hold-

*Village of v. Carton et al.*, 132 Ill. 100 (Af.); *Otis v. Chicago, City of*, 161 Ill. 199 (R. R.); *Lundberg v. Chicago, City of*, 183 Ill. 572 (R. R.); *Davidson et al. v. Chicago, City of*, 178 Ill. 582 (R. R.); *Gage v. Chicago, City of*, 143 Ill. 157 (R.); *Washington Ice Co. v. Chicago, City of*, 147 Ill. 327 (R. R.); *Davis*

*et al. v. Litchfield, City of*, 145 Ill. 313 (R.); *Patterson et al. v. Macomb, City of*, 179 Ill. 163 (R. R.); *Holden et al. v. Chicago, City of*, 172 Ill. 263 (R. R.).

<sup>42</sup>—*Gage v. Chicago, City of*, 143 Ill. 157 (R.).

<sup>43</sup>—*McChesney v. Chicago, City of*, 171 Ill. 253 (R.).

ing in the Sterling case, the legislature in 1887 amended section 19 of article 9, providing that the ordinance might refer to maps and plans "in the office of the *proper* clerk." Thereafter the City of Alton passed an ordinance in which reference for description was made to maps, plans, etc., in the office of the *city engineer*. It was held in *City of Alton v. Middleton's Heirs*, 158 Ill. 442, that this was not a compliance with the statute, and the ordinance was fatally defective, as was the ordinance in the Sterling case.

*Second*, defective for lack of proper descriptive words about material to be used, or its nature or character, etc.<sup>44</sup>

Where no provision is made for height of a curb required to be constructed on each side of a roadway.<sup>45</sup>

Defective where void part can be separated from valid.<sup>46</sup>

*Third*, unreasonable—such an improvement as men of ordinary intelligence would pronounce unnecessary or too expensive in view of the present local conditions.<sup>47</sup>

*Fourth*, uncertain—data as to material, dimensions, and distances not sufficient to support bids of contractors.<sup>48</sup>

44—Kuester et al. v. Chicago, City of, 187 Ill. 21 (R. R.); Lusk et al. v. Chicago, City of, 176 Ill. 207 (R. R.); Foss et al. v. Chicago, City of, 184 Ill. 436 (R. R.); Moll et al. v. Chicago, City of, 194 Ill. 28 (R. R.); Kelly et al. v. Chicago, City of, 193 Ill. 324 (R. R.); Chicago, City of v. Hulbert et al., 205 Ill. 346 (R. R.); Wetmore v. Chicago, City of, 206 Ill. 367 (R. R.); Boyd et al. v. Chicago, City of, 187 Ill. 115 (R. R.).

45—Holden et al. v. Chicago, City of, 172 Ill. 263 (R. R.); Jacobs et al. v. Chicago, City of, 178 Ill. 569 (R. R.).

46—Chicago, City of v. Hulbert et al., 205 Ill. 346 (R. R.).

If words of description have a recognized meaning among engineers and contractors, this may be shown orally on the hearing.

Chicago, City of v. Sherman et al., 192 Ill. 576 (Affirmed); Kuester et al. v. Chicago, City of, 187 Ill. 21 (R. R.); Chicago, City of v. Holden et al., 194 Ill. 213 (R. R.).

47—Chicago, City of v. Brown, et al., 205 Ill. 568 (Af.); Hawes v. Chicago, City of, 158 Ill. 653 (R. R.).

48—Hulings et al v. Chicago, City of, 192 Ill. 625 (R. R.); DeWitt,

*Fifth*, invalid—because power by the ordinance was conferred upon the engineer to determine the location of inlet and catch-basin covers.<sup>49</sup>

*Sixth*, void—lack of power or jurisdiction of the municipality to construct the improvement.<sup>50</sup>

Lack of a petition, signed by the owners of a majority of the frontage, addressed to the improvement board.<sup>51</sup>

*Seventh*, variance between ordinance and resolution.<sup>52</sup>

*Eighth*, ordinance void—nullity.<sup>53</sup>

In an application by the City of Chicago to confirm a special assessment to defray the cost of grading and paving Woodlawn Avenue, and make other improvements, the ordinance under which the improvement is sought to be made, after specifying the manner in which the combined curb and gutter and the concrete base for the pavement shall be constructed, provides that upon this concrete base shall be laid "the bitulithic wearing surface" made under patents and processes owned by the Warren Bros. Co., and commercially known and

County of v. Clinton, City of, 194 Ill. 521 (R.); Washburn v. Chicago, City of, 202 Ill. 210 (R. R.).

49—Bradford et al. v. Pontiac, City of, 165 Ill. 612 (R. R.).

50—Chicago, City of v. Blair, 149 Ill. 310 (Af.); Kerfoot et al. v. Chicago, City of, 195 Ill. 229 (R. R.); Nelson et al. v. Chicago, City of, 196 Ill. 390 (R.); Cratty et al. v. Chicago, City of, 217 Ill. 453 (R.); Waukegan, City of, Appellee v. Lyon et al., 253 Ill. 452 (R.).

51—Bloomington, City of v. Reeves et al., 177 Ill. 161 (Af.); Merritt et al. v. Kewanee, City of, 175 Ill. 537 (R. R.).

52—Chicago Terminal Transfer R. R. v. Chicago, City of, 184 Ill. 154 (R. R.); Peoria, City of v. Ohl et al., 209 Ill. 52 (Af.); Smith et al. v. Chicago, City of, 214 Ill.

155 (R. R.); Gardner v. Chicago, City of, 224 Ill. 254 (R. R.); Gage v. Chicago, City of, 227 Ill. 137 (R. R.); Kilgallen et al. v. Chicago, City of, 206 Ill. 557 (R. R.).

53—Bloomington, City of v. Chicago & Alton R. R. Co., 134 Ill. 451 (Af.); East St. Louis, City of v. Albrecht et al., 150 Ill. 506 (Af.); Carlyle, City of v. Clinton, County of, 140 Ill. 512 (Af.); Chicago, City of v. Newberry Library, 224 Ill. 330 (Af.); Madison, Village of, Appellee v. Alton Granite & St. Louis Traction Co., 235 Ill. 346 (R. R.); Moline, City of, Appellee v. C. B. & Q. R. Co., 262 Ill. 52 (R. R.); Lincoln v. Harts et al., Appellants, 256 Ill. 253 (R.); Washington Ice Co. v. Chicago, City of, 147 Ill. 327 (R. R.).

designated as Warren's "bitulithic pavement," composed of carefully selected, sound, hard, crushed stone mixed with bitumen, and laid as hereinafter specified. The validity of this ordinance was attacked on the ground that by providing for the use of the patent wearing surface it prevents or restricts competition in bidding for the construction of the improvement.

The court, after referring to sections 74 and 76 of the Improvement Act which require that there shall be a public letting of all contracts for street improvements that exceed \$500, and reviewing the authorities, held: That the ordinance was void because it tended to prevent or restrict competition among persons who might desire to become bidders for the work.<sup>54</sup>

An ordinance which provided for the tearing up of a comparatively new street improvement and the building of a more expensive one was held to furnish an example of an ordinance that was unreasonable and oppressive upon the tax payers, and on direct attack could be characterized as void.<sup>55</sup> Ordinances in which the data with reference to the improvements are so indefinite and inaccurate as to description and *termini* of the improvement and material to be used, exact dimensions, etc., rendering it impossible for the contractor to know just what he was bidding upon, and would be required to build, furnish an instance of such an indefinite description that will render the ordinance void on a direct attack.

54—Siegel et al. v. Chicago, City of, 223 Ill. 428 (R.); Rossville, Village of, Appellee v. Smith et al., 256 Ill. 302 (R. R.).

55—Chicago, City of v. Brown et al., 205 Ill. 568 (Af.).

Language of Statute of 1872: Power to make local improvements by special assessment or by special taxation, or both, of contiguous property, or general taxation, or

otherwise." Sec. 1, Act of 1897, omits "or both." Chicago, City of, et al v. Brede, 218 Ill. 528 (Af.).

In cities and villages that have adopted the commission form of government the improvement board is no longer a part of the statutory machinery for constructing local improvements. Chrisman, City of, Appellee v. Cusick, 290 Ill. 297 (R. R.).

If the county court on the hearing of the objections sustained the action or proceeding instituted by the municipality, there would remain for the property owner questions of fact which the statute provided must, unless waived, be submitted to a jury. The *first* question of fact upon the assessment, if it is not open to any legal objection, is, "Has the property of the land owner been assessed more or less than it will be benefited by the contemplated improvement?" and, *second*, "Has any land owner been assessed more or less than his proportionate share of the total cost of the improvement?" If the ordinance provided that the total cost of the improvement should be paid by a special assessment, there are no other questions of fact with reference thereto. If the ordinance has provided that the improvement shall be paid for by a special assessment and general taxation, there is the added question, "What proportion of the entire expense of the improvement shall be borne by the public?" On this latter question it is held that the decision of the city council, through its authorized agency, is conclusive and cannot be re-submitted to a jury on the hearing of the objection. The hearing before the jury is conducted as an ordinary action at law. The county court passes upon the competency of the evidence submitted on either side to whose rulings exceptions may be saved as at law. The jury, after hearing all the evidence offered upon either side, and viewing the premises, if so ordered by the court, return their verdict either confirming the assessment roll made, or making such changes as the evidence warrants in their judgment. If a judgment is pronounced on the verdict, there is right of review under the statute of 1837.

#### LOCAL IMPROVEMENT ACT OF 1897

In 1897 the legislature revised the Local Improvement Act of 1872, and re-enacted an entirely new statute. The

principal change, prior to the action of the county court upon the assessment roll, was the provision for an improvement board, the members of which depend upon the size or population of the municipality in which they act. Under the statute, this improvement board has the power of initiating all the improvements that are to be paid for by a special assessment. It acts as advisory of the city council. It has the power to recommend improvements upon its own initiative, or upon the petition or solicitation of property owners in the locality to be improved. The statute provides that it shall keep a record in which its acts shall be recorded. In some respects its function is analogous to that of a master in chancery to the chancellor. The board can advise as to facts, draft an ordinance, and submit its recommendations as embodied in its record for the action or non-action of the city council. Its record is subject to attack by property owners on jurisdictional grounds. The board is first required by one of its members, or some competent person appointed therefor, to make an estimate of the cost of an improvement, and itemize the same to the satisfaction of the board, and also to adopt a resolution to be inscribed upon its records. When this has been done, to appoint a time when a public meeting will be held to which all persons interested are given notice, and at which public meeting the board hears any objections or suggestions the property owners may make. Prior to the calling of this meeting, the improvement board inscribes upon its records a resolution embodying what they have determined is for the best interests of all land owners. Upon hearing the objections or suggestions of the property owners, the board has a right to modify the resolution they have made, or adhere to it. In any event, if the board determines that the improvement should be made, an ordinance is drafted and submitted for adoption, with its recommendations to the city council. If the city council adopt the



recommendations of the board, and pass the ordinance, the proceeding thereafter, under this statute, is substantially the same as under the Statute of 1872, until the hearing is had on the assessment roll in the county court. On that hearing, the property owners, in addition to making the same attacks upon the ordinance, have a right to attack the action of the improvement board as disclosed by its record.

#### NATURE OF IMPROVEMENT BOARD'S RECORD

In *Clarke v. Chicago, City of*, 185 Ill. 354 (R. R.), the court construed section 7 of the Act of 1897, and defines the character of the "record" of the improvement board. Here the statutory time did not elapse between the date of the adoption of the resolution by the board, and the presentation and passage of the ordinance. The court says: "These preliminary requirements as to the contents of the resolution of the board of local improvements, and as to the lapse of time between the adoption of the resolution and the submission of the ordinance are mandatory and jurisdictional in their character. The proceeding under the Act of June 14, 1897, is a statutory proceeding and every step provided by the proceeding, prior to the passage of the ordinance, must be strictly complied with, subject to such classification as may be contained in section 9 of the act.

In view of these extraordinary powers conferred upon the board of local improvements, the requirements as to the preliminary steps to be taken before the passage of an ordinance for an improvement, should be strictly enforced. Here a *prima facie* case made by the recommendation of the board is overcome by proof showing a substantial variance from the preliminary requirements of the law. When the proof showed that no public hearing had been held on this improvement, and that the estimate of the city engineer was no part of the author-

ized resolution, the void character of the resolution was established. Unless a valid ordinance is shown, there is nothing on which a subsequent assessment proceeding can rest. A valid ordinance is the foundation of any improvement by a special assessment and cannot be dispensed with."

In *Trah v. Grant Park, Village of*, 192 Ill. 351 (R. R.),<sup>56</sup> it was held that an ordinance, based upon a petition to the improvement board, that was not signed by one-half of the owners of abutting property on the line of the improvement, was invalid.

In *Bass v. Chicago, City of*, 195 Ill. 109, Reversed,<sup>57</sup> it was held that an ordinance was invalid that was based upon an improvement board record that did not show that a public hearing had been had on the estimate made.

In *Kerfoot v. Chicago, City of*, 195 Ill. 229 (R. R.),<sup>58</sup> it was held that continuous improvement that would cost \$100,000 could not be divided into three sections to avoid the necessity under the statute of 1897 of publishing the ordinance, and that it could not be shown by a member of the board that there was no improper motive in its violation of the statute.

In *Becker v. City of Chicago*, 208 Ill. 126 (R. R.),<sup>59</sup> a confirmation judgment was held erroneous because the improvement board's record was defective.

In *Lyman v. Cicero, Town of*, 222 Ill. 379 (R. R.),<sup>60</sup> the improvement board's record was held fatally defective because the board had not fixed any place or hour for a public hearing; and further, because the estimate of the engineer did not include the cost of a cinder foundation upon which the curb to be built was to rest.

56—*Trah v. Grant Park, Village of*, 192 Ill. 351 (R. R.).

57—*Bass et al. v. Chicago, City of*, 195 Ill. 109 (R.).

58—*Kerfoot et al. v. Chicago, City of*, 195 Ill. 229 (R. R.).

59—*Becker v. Chicago, City of*, 208 Ill. 126 (R. R.).

60—*Lyman, Trustee v. Cicero, Town of*, 222 Ill. 379 (R. R.).

In *Betts et al. v. Naperville, City of*, 214 Ill. 380, (R. R.),<sup>61</sup> it was held that the organization of the improvement board and its right to act could only be inquired into by a writ of *quo warranto*. Section 94 of the Local Improvement Act, as amended in 1901, does not authorize the levy of a special assessment to pay the cost and expenses of maintaining the board of local improvements.

## RES ADJUDICATA

The doctrine of *res adjudicata* has been interposed as a shield to protect the land owner from a second attempt on the part of the municipality to re-cast and have confirmed upon his property a second assessment.

In a proceeding to impose a supplemental assessment to cover a deficiency in an assessment already made, upon land already burdened as found by a jury all that it would be benefited, the court observes: "It is clear, as it seems to us, that the effect of the supplemental assessment would be to destroy the equal distribution contemplated by the statute, and make the property of appellant bear a portion of the burden that should have been borne by other property not assessed its fair and proportionate share." This cannot be done.<sup>62</sup>

It is further held that section 46, article 9, part 1, R. S. 1872, "had no application to a case where a judgment has been rendered confirming the assessment, and several terms of court have passed and such judgment has been affirmed upon appeal."<sup>63</sup>

Again "a city which prosecutes a condemnation proceeding for the extension of a street across a railroad right-of-way to judgment fixing the amount of compen-

61—*Betts et al. v. Naperville, City of*, 214 Ill. 380 (R. R.).

63—*McChesney et al. v. Chicago, City of*, 161 Ill. 110 (R. R.).

62—*Greeley v. Cicero, Town of*, 148 Ill. 632 (R. R.).

sation, cannot maintain a subsequent proceeding for the same extension under the pretense of abandoning the former proceeding." <sup>64</sup>

Again it is held error under a supplemental petition for a further special assessment, to exclude a former judgment upon the same property, thus to show that the property had already been assessed its fair proportion. <sup>65</sup>

Again it is held, that it is error to refuse upon motion made in proper time in behalf of heirs who had no knowledge of pending proceedings, to set aside a confirmation judgment entered by default after death of the property owner who had in his lifetime filed objections. <sup>66</sup>

Again it is held error to vacate and set aside a confirmation judgment long after the term has gone by at which it was entered. <sup>67</sup>

Again an assessment was made under the Act of 1897 to defray the cost of a street improvement. As to eight lots fronting on the street the owner gave in evidence under objection a judgment rendered in 1895 confirming an assessment upon the same street; and the court observes: "As the judgment had never been reversed and was in full force, it was a bar to another judgment sought to be recovered confirming another assessment for a similar improvement of the same street." <sup>68</sup>

On May 22nd, 1899, the City Council of Chicago adopted an ordinance providing for the construction of a brick sewer in 63rd Street, to be paid for by special assessment. Judgment of confirmation was entered on the 26th of September following. On motion of the city,

64—I. C. R. Co. v. Champaign, City of, 163 Ill. 524 (R. R. Eminent Domain).

65—Wickett et al. v. Cicero, Town of, 152 Ill. 575 (R. R.).

66—Nicholes et al. v. Chicago, City of, 184 Ill. 43 (R. R.).

67—Chicago, City of v. Nicholes et al., 192 Ill. 489 (Af.); Rich et

al. v. Chicago, City of, 187 Ill. 396 (R. R.); Doremus et al. v. Chicago, City of, 212 Ill. 513 (R. R.).

See Phelps et al. v. Mattoon, City of, 177 Ill. 169 (R. R.), for case where "The doctrine of *res adjudicata* does not apply."

68—Rich et al. v. Chicago, City of, 187 Ill. 396 (R. R.).

without notice to property owners, March 21, 1900, the judgment of confirmation and petition were dismissed, it being shown that the ordinance authorizing the former proceeding had been repealed. On April 13, 1900, the city council adopted an ordinance providing for the identical improvement, the ordinance being in words and figures a repetition of the former. The objection was, that the judgment formerly entered under the prior ordinance constituted an adjudication of the question of benefits. The supreme court so held and reversed without remanding.<sup>69</sup>

In the levy of an original assessment, the finding of the jury was: "The property was not assessed more nor less than it would be benefited by the proposed improvement nor more nor less than its proportionate share of the cost of such improvement." Held in a proceeding to levy a supplemental assessment the question of benefits was *res judicata*.<sup>70</sup>

#### ASSESSMENT ROLL—ERROR IN DESCRIPTION OF PROPERTY

Where the assessment roll did not show what part of the assessment against the lots was assessed against each lot, block, tract, or parcel of land separately in the proportion in which they would be severally benefited by the improvement, it was held error to admit the assessment roll.

#### CITY SUBDIVIDED

Where the city for the purpose of spreading a special assessment divided up pieces or parcels of land into lots

69—*McChesney et al. v. Chicago, City of*, 188 Ill. 423 (R.).

70—*Cicero, Town of v. Green et al.*, 211 Ill. 241 (Af.); *Chicago Union Traction Co. v. Chicago, City of*, 208 Ill. 187 (R. R.).

When the court makes a finding

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of fact and it is desired to have a review of the law applicable to the facts, written propositions should be submitted. *West Chicago Park Comrs. v. West Side Met. R. Co.*, 182 Ill. 246 (Af.).

for the purpose of specially assessing, it was held error to confirm the assessment.<sup>71</sup>

#### ASSESSMENT BEFORE ORDINANCE

Where an assessment was levied and spread prior to an ordinance to support it, it was held error to confirm it.<sup>72</sup>

#### FUTURE WORK TO BE DONE

Where the benefits to be derived from an improvement depend upon future work to be done that is not within the terms of the ordinance and of which the property owner has no positive assurance that it ever will be done, it will be error to confirm the assessment.<sup>73</sup>

#### LAND WRONGFULLY INCLUDED

An assessment roll was held vicious and confirmation denied because it rested upon an estimate that did not exclude a right-of-way that it was the duty of a railroad to pave.<sup>74</sup>

#### WRONG DESCRIPTION

Property included in an assessment roll was described as "part of blocks 8 and 9 and right-of-way across Broadway" \$16,500. It was held that fixing in the aggregate the amount of the assessment was not a com-

71—Warren v. Chicago, City of, 118 Ill. 329 (R. R.); Cram et al. v. Chicago, City of, 139 Ill. 265 (R.).

72—East St. Louis, City of v. Albrecht et al., 150 Ill. 506 (Af.).

73—Edwards et al. v. Chicago, City of, 140 Ill. 440 (R. R.); Title

Guarantee & Trust Co. et al., Receiver v. Chicago, City of, 162 Ill. 505 (R. R.); Bickerdike et al. v. Chicago, City of, 185 Ill. 280 (R. R.); Berdel et al. v. Chicago, City of, 217 Ill. 429 (R. R.).

74—Chicago, City of v. Cummings et al., 144 Ill. 446 (Af.).

pliance with section 140, article 9, chapter 24 of the revised statutes of 1874, which provided that the commissioners in making an assessment roll should give a description of each lot and the amount of benefit chargeable to that specific lot.<sup>75</sup>

## RAILROAD RIGHT OF WAY

Property included in an assessment roll was described as "Ill. Cent. R. R., part of section 23, T. 38 N. R. 14, being a strip of land 200 ft. in width and 1,080 ft. in length \* \* \* occupied by said railroad company as right-of-way for its main and side tracks" \* \* \* \$3,665.80. It was held error for the county court to refuse the following instruction:

"The court instructs the jury that the right-of-way of the Ill. Cent. Railroad Co., which is assessed for the improvement of Madison Avenue, is held by said company only for railroad purposes and uses, and the said company cannot lawfully apply said right-of-way to any other use or purpose than such as is necessary for the operation and maintenance of its railroad."<sup>76</sup>

The right-of-way of the Chicago & Northwestern Railway Co. was specially assessed \$389.40 for the improvement of two avenues in the Village of River Forest and the following objection was sustained: "Said property is not benefited by said proposed improvement."<sup>77</sup>

Where railroad property is restricted by grant or by the statute to a particular use, the benefit to be derived by said property must be determined by answer to the question: "Will the property for its restricted use be enhanced in market value?"<sup>78</sup>

75—*Louisville & Nashville R. R. Co. et al. v. East St. Louis, City of*, 134 Ill. 656 (R.).

76—*I. C. R. R. Co. v. Chicago, City of*, 141 Ill. 509 (R. R.).

77—*River Forest, Village of v. Chicago & Northwestern Ry. Co.*, 197 Ill. 344 (Af.).

78—*Lincoln, City of, Appellee v. C. & Alton R. Co.*, 262 Ill. 11 (R.

Chicago, City of, Appellee v. Chicago & North Western Railway Co., 278 Ill. 86, was reversed because the county court overruled an objection to the effect that the railroad right-of-way was not benefited. (Team yard and elevated right-of-way.)

MAINTENANCE OF BOARD OF LOCAL IMPROVEMENTS—ERROR TO ASSESS

An assessment that includes an item of costs for maintaining the board of local improvements, confirmed by the county court, reversed because not authorized by section 94 amended (Laws of 1901, p. 117).<sup>79</sup>

IMPROVEMENT BOARD'S RECORD

The improvement board's record was successfully attacked because the petition addressed to the board was not signed by one-half the property owners on the line of the improvement.<sup>80</sup>

It was held fatal to jurisdiction that the improvement board's record did not show that any time had been fixed for a public meeting, or an estimate of the cost of the improvement.<sup>81</sup>

It was held, where no itemized estimate of the cost by the engineer appeared in the resolution, an ordinance based on such resolution would be declared void.<sup>82</sup>

Likewise, an assessment would be void that contained an item of expense for maintaining the improvement board.<sup>83</sup>

R.); also Highwood, City of, Appellee v. Chicago & Northwestern Railway Co., 276 Ill. 98 (R. R.).

79—Chicago Consolidated Traction Co. v. Oak Park, Village of, 225 Ill. 9 (R. R.).

80—Trah v. Grant Park, Village of, 192 Ill. 351 (R. R.).

81—Bass et al. v. Chicago, City of, 195 Ill. 109 (R.).

82—Becker v. Chicago, City of, 208 Ill. 126 (R. R.).

83—Becker v. Chicago, City of, 208 Ill. 126 (R. R.).



Where the commissioners who levied the assessment received as compensation a percentage of the amount assessed, it was held that they were incompetent to act.<sup>84</sup>

Where, under the Act of 1897, the engineer's estimate was not itemized, but a sum in gross stated, it was held erroneous to confirm the assessment.<sup>85</sup>

The requirement of section 7, Act of 1897, that the estimate of the engineer should be made a part of record of the first resolution, is jurisdictional and its absence therefrom will render a confirmation judgment erroneous.<sup>86</sup>

The provisions of section 7, Act of 1897, with reference to the board fixing the time that shall elapse between the date of the adoption of the resolution and its submission to the city council are mandatory and jurisdictional.<sup>87</sup>

#### JURISDICTION

##### PROPERTY OWNER'S PETITION

A petition, under section 4, Act of 1897, of property owners filed with the improvement board June 23, 1902 and held on Aug. 11, 1902 by the county court to be insufficient to invest the board of local improvements with jurisdiction, was re-filed Sept. 26, 1902 to support a second recommendation of said board, under which a confirmation judgment was entered.

The supreme court in reversing and not remanding observes:

84—*Chase, Exr., et al. v. Evanston, City of*, 172 Ill. 403 (R. R.); *Murr et al. v. Naperville, City of*, 210 Ill. 371 (R. R.).

85—*Peoria, City of v. Ohl et al.*, 209 Ill. 52 (Af.) and *Chicago, City of, Appellee v. Ill. Malleable Iron Co. et al.*, 293 Ill. 109 (R. R.).

86—*Bickerdike et al. v. Chicago,*

*City of*, 203 Ill. 636 (R. R.); *Chicago Union Traction Co. v. Chicago, City of*, 209 Ill. 444 (R. R.); *Killgallen et al. v. Chicago, City of*, 206 Ill. 557 (R. R.).

87—*Clarke et al. v. Chicago, City of*, 185 Ill. 354 (R. R.); *Bass et al. v. Chicago, City of*, 195 Ill. 109 (R.).

"The petition had served its purpose, and had no further validity to endow the board of local improvements with authority and jurisdiction to act in September and recommend the ordinance now sought to be enforced. \* \* \*

"A petition which had the requisite number of qualified petitioners in June, 1902, may or may not have contained the names of the requisite number of persons who were residents of the village and owners of property abutting on or to be affected by the improvement in September of that year."<sup>88</sup>

#### ESTIMATE OF ENGINEER

After a public hearing held pursuant to notice, the estimate of the engineer cannot be increased without notice to the property owner.<sup>89</sup>

Estimate referred to in section 10 must be itemized substantially the same as that required by section 7. *Marion, City of, Appellant v. Sisney et al.*, 252 Ill. 421 (Af.).

In *Chicago, City of, Appellee v. Illinois Malleable Iron Co. et al.*, 293 Ill. 109 (R. R.), an attack was made upon a judgment confirming a special assessment "for grading, curbing and paving with asphalt North Paulina street" in the City of Chicago.

The point of attack was, that neither the resolution nor the *engineer's estimate* furnished the information required by sections 7 and 8 of the improvement act. The description in the resolution and *estimate*, so far as it related to the "combined curb and gutter" was: "Granite concrete combined curb and gutter on cinders, gravel or sand 5,180 lineal feet at \$0.95, \$4,921." The court held (citing the *Huleatt* case, 276 Ill. 466, *Bickerdike*

<sup>88</sup>—*Vennum v. Milford, Village of*, 202 Ill. 423 (R.).

<sup>89</sup>—*Chicago, City of v. Wilder*, 184 Ill. 397 (Af.).

case, 203 *id.* 636; Ohl case, 209 *id.* 52, and the Doran case, 225 *id.* 514) that the items which "are to enter into the improvement and the cost and character of each of them are facts material to be considered by the property owner in determining whether he will consent to or oppose the improvement, and for his protection the requirements of the statute must be observed. These requirements are *jurisdictional*, and if the authorities do not comply with the statute in carrying out the preliminary steps no valid ordinance can be passed and consequently no valid assessment can be made."

## PARTIES

## RECORD NOT SUFFICIENT TO COMPEL APPEARANCE

The property owner did not appear on the application for a confirmation, and the record showed that the assessment was, in fact, made before the correct date of the time of a public meeting of the corporate authorities had been given. It was held that the confirmation was erroneous.<sup>90</sup>

Again the record did not show that publication had been made for five successive days as required by the statute, and a judgment by default was reversed for that reason.<sup>91</sup>

Again on a record in which it appeared that the property owner had been defaulted, it was held that the confirmation judgment was erroneous because only two, of three commissioners appointed, had signed the estimate of cost.<sup>92</sup>

In Chicago, City of, Appellee v. Stein, 252 Ill. 409

<sup>90</sup>—Derby v. West Chicago Park Comrs., 154 Ill. 213 (R.).

<sup>91</sup>—Toberg et al. v. Chicago, City of, 164 Ill. 572 (R. R.).

<sup>92</sup>—Adeock v. Chicago, City of, 160 Ill. 611 (R. R.); Moore et al.

v. Mattoon, City of, 163 Ill. 622 (R.); Markley v. Chicago, City of, 170 Ill. 358 (R. R.); Hinkle et al. v. Mattoon, City of, 170 Ill. 316 (R. R.).

(R. R.), the question arose whether a certificate of a publication notice signed: "David E. Town, secretary, Chicago Evening Post Co." was sufficient to give jurisdiction of the person and warrant a judgment confirming the assessment roll. As there were no facts in evidence showing that the secretary had any authority to sign, it was held that it would not. In so holding the court observes:

"In statutory proceedings like those provided in the Local Improvement Act, where the property of the citizen may be taken upon notice by publication and without personal notice to the property owner, no presumption can be indulged in support of the jurisdiction of the court in which the proceedings are carried on, but the proceedings must be in strict conformity to the statute; and this must be made to appear upon the face of the record of the proceedings. \* \* \*

"David E. Town was an officer of the corporation, but was he its authorized agent for the purpose of making such certificate? We think not. \* \* \*

"In view of what has been said by text writers and in the adjudicated cases upon the subject, we are of the opinion that David E. Town, as secretary did not possess the implied power, as a matter of law to make such a certificate, and that for want of proof of the publication of the notice required by the statute the court was without jurisdiction to confirm said special assessment."

#### SUBJECT MATTER

In *Casey, City of, Appellee v. Cincinnati, Hamilton & Dayton Railway Company*, 263 Ill. 352 (R. R.), four successive applications had been made to the county court for judgment against lands that had been reported delinquent by the collector of special assessments in the City of Casey. After the improvement had been completed, the city council passed another ordinance, which

resulted ultimately in a judgment of confirmation against the same property in the sum of \$1,620.11.

The ordinance (section 5) provided: "Wilber H. Hickman is hereby authorized to follow the proper legal proceedings in the name of the City of Casey, Ill. if any further proceedings are required, for the collection of the amounts herein stated, according to the provisions of the ordinance and as by statute in such cases made and provided."

In holding that the county court lacked jurisdiction of the subject matter the court observes:

"The levying of a special assessment under the Local Improvement Act is purely statutory. Jurisdiction can be acquired only in strict conformity with the statute, and this must appear upon the face of the record, for no presumption will be indulged in support of the jurisdiction. \* \* \* The petition in this case shows only that the petitioner is the City of Casey. It is signed, "City of Casey, Illinois, by Wilber H. Hickman, Attorney." Hickman is not stated to be city attorney or any other officer of the city, but it is said in argument that it is to be presumed he is an officer of the city. As has been said, however, there is no presumption in favor of the jurisdiction of a court proceeding under special statutory authority. The record must show its jurisdiction.

"It is also argued that the objection was waived because other objections were filed at the same time and after the objection to the jurisdiction was overruled. An objection to the jurisdiction of the subject matter cannot be waived. Such jurisdiction cannot be conferred by consent."

#### SECTION 56, ACT OF 1897

Section 56 of the Act of 1897 does not apply to proceedings begun before the act took effect.<sup>93</sup>

<sup>93</sup>—Chicago, City of v. Nicholes et al., 192 Ill. 489 (Af.).

Section 56 does not permit a city, when it discovers that the money to be derived from the assessment spread will not be sufficient to pay the cost of the improvement, to dismiss the proceeding and relitigate in another proceeding the question of benefits. The city must proceed with the work, and if there is a deficiency of funds found, when the contract is completed, apply for a new assessment under section 59.<sup>94</sup>

VACATION OF ASSESSMENT—NEW ASSESSMENT—UNDER  
SECTION 57

Section 46, article 9, Statute of 1872, re-enacted as section 57, Act of 1897. That section as originally passed was as follows: "If any assessment shall be annulled by the city council, or board of trustees, or set aside by any court, a new assessment may be made and returned, and like notice given and proceedings had as herein required in relation to the first; and all parties in interest shall have like rights, and the city council, or board of trustees, and the court shall perform like duties and have like powers in relation to any subsequent assessment as hereby given in relation to the first assessment."

This section was construed by the court in *McChesney v. Chicago, City of*, 161 Ill. 110 (R. R.). Here the first ordinance was passed July 11, 1892; petition filed Aug. 25, 1892; confirmation judgment entered January, 1893; this confirmation judgment on appeal to the supreme court was affirmed Oct. 29, 1894.

Pending the appeal, the city council on November 20, 1893, repealed the ordinance; Dec. 7, 1893, the county court, without notice to the land owner, vacated its judgment and dismissed the first petition.

<sup>94</sup>—*McChesney et al. v. Chicago, City of*, 188 Ill. 423 (R.).

December 21, 1893, the city council filed its petition for assessing cost of construction and laying of a water supply pipe on Yates Avenue. The land owners made a motion to dismiss the petition, on the ground that the matters sought to be litigated had already been adjudicated in the prior proceeding. The motion was overruled, and the supreme court, in holding this error, and construing section 57, observed: "That section 57 contemplates cases where the proceedings are still in fieri. As was said by this court in *Union Building Assoc. v. Chicago, City of*, 61 Ill. 439 (p. 444): "We will not impute to the legislature the intention of nullifying the judgments and decrees of courts of general jurisdiction in advance, when it would be beyond the constitutional power of that body to do so after they were made, and especially in relation to statutory proceedings to divest the citizen of his property without his consent."

"This is not an abandonment of the improvement, but an attempt to abandon a valid assessment after judgment and after the term and to substitute another assessment for the same, or substantially the same improvement."

Further in support of its holding the court observed: "A judgment cannot be vacated by the court which rendered it, after the term at which it was rendered, except in obedience to the mandate of an appellate court on reversal. The repeal of an ordinance for a special assessment pending an appeal from a judgment confirming the assessment does not justify the court in vacating the judgment after several terms of court have passed, notwithstanding the provisions of the City and Village Act that if an assessment shall be annulled or set aside a new assessment may be made. Judgment of confirmation affirmed on appeal bars a second judgment under a new ordinance for the same improvement, notwithstanding the repeal of the former ordinance and the attempted

setting aside of the former judgment at a subsequent term, pending the appeal.”<sup>95</sup>

In order to present a case within the provisions of section 57, there must have been, prior to the first assessment, a valid ordinance, or one susceptible of being made so by amendment. An improvement made prior to the passage of an ordinance authorizing it cannot thereafter be validated by passing an ordinance under the provisions of said section 57.<sup>96</sup>

Section 57, Act of 1897, provides: “If any assessment shall \* \* \* be set aside by any court, a new assessment may be made and returned, etc.” A confirmation judgment that is “reversed and remanded,” does not of itself warrant a new assessment under this section.

The construction that should be placed upon this clause of section 57 was brought to the attention of the supreme court in *Holden v. Chicago, City of*, 212 Ill. 289 (R.).

In *Chicago, City of v. Holden et al.*, 194 Ill. 213, the confirmation judgment was reversed and the cause remanded, because the court below had refused to allow the city “to prove that the term ‘flat stones,’ as used in the ordinance, had a definite, well known and established meaning in the city of Chicago with reference to street improvements.” The remanding order was duly filed in the county court but the cause was “not re-tried, dismissed or in any manner disposed of.”

The city proceeded under section 57 to have levied and confirmed “a new special assessment to pay an alleged deficiency for the paving of a part of Ogden Avenue, in the City of Chicago.” The supreme court in reversing but not remanding this judgment observes:

“The judgment of this court remanding the cause

95—*Doremus et al. v. Chicago, City of*, 212 Ill. 513 (R. R.).

96—*St. John et al. v. East St. Louis, City of*, 136 Ill. 207 (R. R.);

*East St. Louis, City of v. Albrecht et al.*, 150 Ill. 506 (Af.); *Chicago, City of v. Richardson*, 213 Ill. 96 (Af.).



was not a final judgment disposing of the cause, or holding that the assessment was annulled or set aside, or that the ordinance was so insufficient that the collection of the assessment made under it was impossible, but, on the contrary, it was said that if the proof which it was proposed by the city to make upon the second hearing, that the term 'flat stones' had a well known and commercial meaning among people engaged in the business of constructing such improvements, could be made, it was not only possible, but entirely proper, that the assessment should be sustained, and to determine that question the cause was remanded. \* \* \* We think the action of the city in passing the ordinance and making the levy of the new assessment was improvidently done, and that the judgment of the county court confirming the same should be reversed."<sup>97</sup>

#### SUPPLEMENTAL ASSESSMENT—UNDER SECTION 59, ACT OF 1897

The amount that can be levied upon property once assessed to meet a deficiency rests upon the existence of two facts, as shown by the record: to wit: that the property is still subject to assessment, because it has not been found in some prior proceeding that the property will not be benefited more than it has already been assessed; that the contract already let has been performed.<sup>98</sup>

In *Sheriffs v. Chicago, City of*, 213 Ill. 620, a supplemental assessment was levied to pay a claimed deficiency for a street improvement. The error assigned was that the court "refused to hold, upon the trial of the question of benefits, the judgment of confirmation in the original

<sup>97</sup>—*Holden et al. v. Chicago, City of*, 212 Ill. 289 (R.).

The interest on vouchers ceases when the money applicable to said vouchers is received by the city.

*Chicago, City of v. Hurford et al., Appellees*, 238 Ill. 552 (Af.).

<sup>98</sup>—*Chicago, City of v. Richardson* 213 Ill. 96 (Af.).

proceeding was *prima facie* and adjudication that the property of appellant had been assessed in that proceeding as much as it would be benefited by the improvement." The court in its opinion reversing carefully distinguishes the case from *Cody v. Cicero*, 203 Ill. 322, where the "judgment was entered by default, and the question of benefits was not expressly determined," and hold that the two cases are not in conflict.

Under section 59 as first enacted, it was held that there could be no supplemental assessment to pay for a deficiency until after the contract had been performed.<sup>99</sup>

This position taken by the supreme court led to the amendment by the legislature of section 59 wherein it was provided that a supplemental assessment for an estimated deficiency of the cost of the work might be had at any time after bids had been received.<sup>1</sup>

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Sheriff v. Chicago, City of, 213 Ill. 620 (R. R.).

Taylorville, Def. in Error v. Johnson, 242 Ill. 175 (R. R.).

Waukegan, City of, Appellee v. Burnett et al., 234 Ill. 460 (R. R.).

Waukegan, City of, Appellant v. De Wolf et al., 258 Ill. 374 (Af.).

Waukegan, City of, Appellee v. Lyon et al., 253 Ill. 452 (R. R.).

Waukegan, City of, Appellee v. Wetzels et al., 261 Ill. 498 (Af.).

Winnetka, Village of, Appellee v. Taylor et al., 288 Ill. 624 (R. R.).

## CHAPTER XVIII

### SPECIAL ASSESSMENTS

#### DIRECT ATTACK : UNSUCCESSFUL

#### PRINCIPAL POINTS OF ATTACK—COURT PRACTICE—ORDINANCE AND IMPROVEMENT BOARD RECORD

The cases in which confirmation judgments have been rendered for the municipality and sustained, or that have been reversed in favor of the municipalities, are more numerous than those in which the municipalities have been defeated; and the points of objection that have been raised by the property owners and overruled by the courts are still more numerous.

The principal points of attack have been the ordinance and the improvement board record. The members of the supreme court have not, in all cases, agreed with reference to the epithet that should be applied to ordinances on review.\*<sup>1</sup> There is agreement, however, on the proposition that ordinances that are susceptible of amendment are not void. The position that the city council occupied, under the law, prior to 1870, was analogous to a court of record, and under those circumstances, it would be proper, under the liberal rules of amendment, in equity and under the statute to speak of the city council as "amending its ordinances." But, under the Constitution of 1870, the county court was substituted for the city council, to whom all questions of

1—*Kuester et al. v. Chicago, City of*, 187 Ill. 21 (Reversed, court divided); *Rich et al. v. Chicago, City of*, 187 Ill. 396 (R. R.).

See statutory review of verdicts.  
*Special assessments.*

law arising between the property owner and the municipality must be addressed.

Courts of record have power to amend their record and to determine jurisdictional questions. An ordinance of a municipality is rather a record of that body than a record of the county court, and whatever amendments are made would have to be made by the municipality. It is, therefore, extending the doctrine of amendments in these special assessment cases further, than it has ever been done under the common law and equity practice, to speak of amending an ordinance as though it were a part of the record of the county court.

When the supreme court reviews a confirmation judgment upon questions of law, the record is viewed as is a decree in equity on appeal. The court seeks to determine what is equitable and just, between the petitioning municipality and the land owner, rather than rule upon technical propositions of law. No objections unless they are jurisdictional ones, such as an attempt of the municipality to act outside the legislative grant of power or a neglect to perform some duty required by statute to bring itself within the sphere of action, can be raised on review that were not made and passed upon by the court below. When the county court makes a finding of fact, or questions of benefit and damage are submitted to a jury, unless the evidence is preserved as is required in law under the statute of 1837, such findings of fact will not be disturbed on review; and only questions of law, properly saved, will be considered. The same can be said of motions; unless the evidence is preserved upon which the court below acted, there can be no review of fact. See *Chicago, City of v. Ogden, Sheldon & Co. et al.*, 227 Ill. 595 (Af.).

ORDINANCE—DESCRIPTIVE WORDS UNDER—SEC. 8, STATUTE OF  
1897

The Statute of 1897 (sec. 8, p. 107, provides: "Such ordinance shall prescribe the nature, character, locality



and description of such improvement, and shall provide whether the same shall be made wholly or in part by special assessment, or special taxation of contiguous property; and if in part only shall so state." The same requisites were required to be stated in the ordinance under the former statute. (Sec. 134, Ch. 24, R. S. 1874, p. 234.)

The object of these requirements is to give the property owner a general idea of what the improvement is to be, and how his property stands related to it, and to enable an engineer to know, or by measurement to determine, its exact location and to estimate the amount of material necessary to complete it and its cost.

#### WHAT WILL AMOUNT TO SUFFICIENT DESCRIPTION

Without entering into detail a substantial compliance with the statute is all that is required.<sup>2</sup> The difficulty is to apply the rule to the facts proven or admitted in each case.<sup>3</sup>

It has been held that an ordinance in which indefinite and uncertain terms are used, will be within the statutory requirements, if it can be shown by oral proof that these terms have a definite and certain meaning to civil engineers in the locality where the improvement is to be made.<sup>4</sup>

2—Pearce et al. v. Hyde Park, Village of, 126 Ill. 287 (Af.); Barber et al. v. Chicago, City of, 152 Ill. 37 (Af.); Danville, City of v. McAdams et al., 153 Ill. 216 (R. R.); Chicago, City of, Appellant v. LeMoine et al., 243 Ill. 379 (R. R.); Springfield, City of v. Sale et al., 127 Ill. 359 (R. R.).

3—Belleville, City of v. Herzler et al., 225 Ill. 404 (R. R.); Belleville, City of v. Pfingsten et al., 225 Ill. 293 (R. R.); Woods v. Chicago,

City of, 135 Ill. 582 (Af.); Chicago Union Tract. Co. et al. v. Chicago, City of, 215 Ill. 410 (Af.); Chicago Union Tract. Co. v. Chicago, City of, 222 Ill. 144 (Af.); Ogden, Sheldon & Co. v. Chicago, City of, 224 Ill. 294 (Af.); Haley et al. v. Alton, City of, 152 Ill. 113 (Af.); Chicago, City of v. Singer et al., 202 Ill. 75 (R. R.).

4—Levy v. Chicago, City of, 113 Ill. 650 (Af.); Chicago Union Tract. Co. v. Chicago, City of, 222 Ill.

An ordinance declared that a brick pavement should be "laid on a foundation of cinders, sand, gravel, or other material equally suitable." It was held that the kind of material was not thereby rendered uncertain, as "other material equally suitable" could be rejected as surplusage.<sup>5</sup>

An ordinance that provided for the construction of a sewer with "necessary man-holes" was held to be sufficiently descriptive of the location and number, because an engineer could determine the number and location.<sup>6</sup>

With reference to the quality of brick that should be used in a street improvement, an ordinance that called for the "best quality of brick made" was held sufficient, as their selection was to be made by the city engineer and street committee.<sup>7</sup>

An ordinance provided: "Curbstones now placed on each side of the roadway of said Ashland Avenue and on each side of said roadways of all intersecting streets and alleys, extending from the curb line to the street line, produced on each side of said Ashland Avenue between said points, to the extent of 1,810 lineal feet shall be reset." There was also a provision for paving the roadways of South Ashland Avenue between said points and of all intersecting streets. It was held that the fact that curb lines had not been established on one of the intersecting streets would not render the ordinance uncertain as "the ordinance is designed to provide for the improvement of Ashland Avenue," and not the intersecting streets.<sup>8</sup>

An objection to an ordinance was: "That it did not

144 (Af.); Shannon et al. v. Hinsdale, Village of, 180 Ill. 202 (Af.).

5—Jacksonville Ry. Co. v. Jacksonville, City of, 114 Ill. 562 (Af.).

6—Springfield, City of v. Mathus et al., 124 Ill. 88 (R. R.).

7—Kimble et al. v. Peoria, City of, 140 Ill. 157 (Af.).

For definition of "intersecting" see Gage et al. v. Chicago, City of, 203 Ill. 26 (Af.).

8—Beers et al. v. Chicago, City of, 225 Ill. 376 (Af.).

describe the thickness of the vitrified tile-pipe to be used." The court in sustaining the ordinance observes: "The ordinary and usual tile-pipe as used in commerce and trade, of a standard thickness as recognized by manufacturers, would be included in the term 'vitrified tile-pipe,' as its thickness is usually determined by its internal dimensions."<sup>9</sup>

Though an ordinance does not state the specific amount to be raised by special tax and amount to be raised by general tax, it will not be declared void if the *data* is given whereby these amounts can be determined.<sup>10</sup>

#### ORDINANCES—NECESSARY AVERMENTS—PRESUMPTIONS

An ordinance provided that a sewer should be laid along certain streets, naming them, but did not aver that "the *locus in quo* of the proposed improvement is within the City of Chicago." The court in holding that the presumption will be indulged that the city was acting within its territorial jurisdiction, observes: "The ordinance was passed by the city council in the exercise of its statutory authority to make local improvements by special assessment, and we are of the opinion that the same intendments in favor of its validity should be indulged in, which usually prevail in relation to the acts of other legislative bodies, viz.: that such body has not intended to exceed, and has not in fact exceeded, its territorial jurisdiction."<sup>11</sup>

#### ORDINANCE—REASONABLE—DEFINITE

Ordinance not open to attack because unreasonable, because it provides that there shall be placed on both

9—Hynes v. Chicago, City of, 175 Ill. 56 (Af.).

10—Kimble et al. v. Peoria, City of, 140 Ill. 157 (Af.).

11—Delamater et al. v. Chicago, City of, 158 Ill. 575 (Af.); Stanton et al. v. Chicago, City of, 154 Ill. 23 (Af.).

sides of a sewer opposite each 25 feet of lot frontage "house connection slants." This does not amount to an arbitrary subdivision of the property assessed. *Chicago, City of v. Corcoran*, 196 Ill. 146 (R. R.).<sup>12</sup>

Ordinance not indefinite which provides for paving a street, if it furnishes the data by which the exact width can be ascertained. It is not necessary to state the width of the street, if from specifications in the ordinance it can be determined.<sup>13</sup>

An ordinance that provides for sodding a part of a street, graveling a part and a sewer under it, is not open to the charge of combining three improvements.<sup>14</sup> Nor is one, that unites several streets and parts of streets, invalid, if so related that they can be considered as one entire scheme of improvement.<sup>15</sup>

Ordinance not invalid that refers to an ordinance on file in the city clerk's office that establishes the grade of a street.<sup>16</sup>

In *Belleville, City of v. Miller*, 257 Ill. 244 (Af.), it is held, that an ordinance will not be declared unreasonable unless the evidence clearly shows it.

In determining whether a sidewalk ordinance is reasonable the facts to be considered are: Width and material of the sidewalk to be constructed; width of the street; locality (business, residence or both); its present condition (as to its being in or out of repair, safe or unsafe); value of abutting property.<sup>17</sup>

12—*Duane v. Chicago, City of*, 198 Ill. 471 (Af.); *Walker et al. v. Chicago, City of*, 202 Ill. 531 (Af.).

13—*Woods v. Chicago, City of*, 135 Ill. 582 (Af.).

14—*Murphy v. Peoria, City of*, 119 Ill. 509 (Af. in pt., R. in pt.).

15—*Springfield, City of v. Green et al.*, 120 Ill. 269 (R. R.); *Wilbur et al. v. Springfield, City of*, 123 Ill. 395 (Af.).

16—*Carlinville, City of v. McClure*, 156 Ill. 492 (R. R.); *Chicago & Northern Pacific R. R. Co. v. Chicago, City of*, 172 Ill. 66 (Af.); *Steele et al. v. River Forest, Village of*, 141 Ill. 302 (Af.); *Shannon et al. v. Hinsdale, Village of*, 180 Ill. 202 (Af.).

17—*Chicago, City of v. Wilson et al.*, 195 Ill. 19 (R. R.).

A description in a paving ordinance is sufficient if considered within the terms of a general ordinance given in evidence. Any contractor, or person experienced in constructing pavements, could substantially comply with the improvement ordinance according to its intent.<sup>18</sup>

#### DEFECTIVE ORDINANCE AS DISTINGUISHED FROM A VOID ORDINANCE

*McChesney v. Chicago, City of*, 201 Ill. 344, was reversed because the court below sustained an ordinance that provided that the cost of the assessment should be put on the property. It was held, when the cause was re-docketed that a new ordinance was not required, but the assessment might be recast and the error eliminated.<sup>19</sup>

#### ORDINANCE MAY REQUIRE BIDDERS TO SUBMIT SPECIMENS OF MATERIAL TO BE USED

An ordinance is not void that requires bidders to submit specimen bricks to be subjected to a "specified absorption and abrasion test" by the board.<sup>20</sup>

#### LOCAL IMPROVEMENT DEFINED

An ordinance provided for constructing a reservoir, sinking a well, erecting stand pipes and pumping works. It also provided for laying pipes for the conveyance of water along the streets. It was held that the latter provision could be made a charge upon the property specially benefited.<sup>21</sup>

18—*Chicago Union Trac. Co. et al. v. Chicago, City of*, 215 Ill. 410 (Af.).

19—*McChesney et al. v. Chicago, City of*, 205 Ill. 528 (Af.).

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20—*Chicago, City of v. Singer et al.*, 202 Ill. 75 (R. R.).

21—*Hughes et al. v. Momence, City of*, 163 Ill. 535 (Af.).

A local improvement may be defined as one that enhances the value of property,<sup>22</sup> in a territory not co-extensive with the boundaries of the municipality.

ORDINANCE—WHEN ERROR MAY BE ELIMINATED

*McChesney et al. v. Chicago, City of*, 205 Ill. 528 (Af.). This case was first in the supreme court as *McChesney v. Chicago, City of*, 201 Ill. 344, and reversed because the ordinance illegally required the costs of making and levying the assessment to be included in the assessment against the property.

When the case was re-docketed the city made a motion to have the assessment recast and the error of costs eliminated, which the court did.

On appeal it was contended that the ordinance was void because this item of costs was included in the original estimate and that, therefore, the error could not be cured, but there should be a new estimate. That the court was without jurisdiction to enter the confirmation order.

Court: "If an ordinance for a special assessment is void it is a nullity, and a court can not acquire jurisdiction to confirm an assessment by virtue of it. An ordinance by which a city attempts to levy a special assessment, not authorized by law, is of that nature, as where it provides that the cost of paving approaches to a viaduct or other space which it is the duty of a railroad company to pave, shall be paid by special assessment levied upon the property of individuals." Citing the *Nodeck* case, 202 Ill. 257; 203 Ill. 451. "If an improvement cannot in law be paid for by special assessment, an ordinance providing that it shall be so paid is void, because not within the power of the city."

22—Illinois Cent. R. R. Co. v. Decatur, City of, 154 Ill. 173 (Af.).

A SUPPLEMENTAL ORDINANCE AND NEW ASSESSMENT  
UNDER SECTION 46, ARTICLE 9, 1872

A confirmation judgment was reversed (*Markley v. Chicago, City of*, 170 Ill. 358, December 22, 1897) because the estimate of the cost of the improvement was not signed by the commissioners appointed by the city council. Pending the review of the confirmation judgment, the improvement was completed, accepted by the city and vouchers issued for its payment. After the remanding order had been filed in the county court, the city council passed a supplemental ordinance and a new petition was filed under which the county court annulled its former order confirming the first assessment and appointed three men to make a new assessment. The same party, who had secured a reversal of the former judgment, appeared and filed objections to the confirmation of the new assessment.

In overruling the objections, the court held that "the order of the county court setting aside the first assessment" was not open to the objection that it was done "many terms after the judgment was entered," because the court was acting in obedience to the mandate of the supreme court. Further, it was held, that, as the improvement had been completed under an ordinance that sufficiently specified its "nature, character, etc.," the same details need not be repeated in the supplemental ordinance.

To the objection that the supplemental ordinance had not been recommended by the board of local improvements, as required by the Act of 1897, it was held, that section 99 of the Act of 1897 provided that actions pending at the date of the passage of the Act of 1897, would be controlled and governed by the former act.

The original ordinance (for curbing, grading and paving) provided "that the curbstones shall not be less than four feet long, three feet deep and five inches in

thickness," to be "embedded upon flat stones, the size, quality and kind of which" were not given. It was contended that this description was not sufficient to meet the statutory requirements. But it was held in overruling the objection that the legislature, in declaring "the ordinance shall prescribe the nature, character, locality and description of such improvement" had in mind "the protection of the property owner" and the data necessary for the commissioners" to make an intelligent estimate of the cost." But after an improvement has been completed, the details with reference to size, material, quality, locality, etc., are of no further use, to property owner or commissioner.<sup>23</sup>

#### DEFECTIVE AND VOID ORDINANCE DISTINGUISHED

In *Chicago, City of v. Galt*, 225 Ill. 368, the question arose whether the ordinance under which the assessment had been levied was void. The court below held that it was relying upon *Clarke v. Chicago, City of*, 185 Ill. 354; *Bass v. Idem*, 195 Ill. 109; *Bickerdike v. Idem*, 203 Ill. 636; and *Becker v. Idem*, 208 Ill. 126. The supreme court in reversing, observes:

"In those cases it was held, that the particular mode provided by the statute for the levy of a special assessment must be pursued, and that an ordinance will not authorize an assessment until all the preliminary requirements of the statute have been complied with. Language was used to the effect that the proceedings prior to the adoption of the ordinance are jurisdictional, without which no valid ordinance can be passed, and, in effect, that the ordinances involved were void and the court without jurisdiction to proceed, but in none of them was the question whether the ordinance was void

23—*Markley v. Chicago, City of*, R.); *Chicago, City of v. Galt*, 225 Ill. 276 (Af.); *Chicago, City of* Ill. 368 (R. R.); *Chicago City of*, v. *Hulbert et al.*, 205 Ill. 346 (R. Appelles v. *Gage*, 237 Ill. 328 (Af.).



and a nullity, or merely insufficient or defective, in any manner involved. The actual decision in each case was that the provision of the statute for the protection of the property owner are mandatory and must be strictly complied with. The preliminary requirements of the law are jurisdictional in the sense that they are essential steps in the proceeding, culminating in a special assessment, but it was not held in any case that the county court had no jurisdiction to act at all or to hear and determine the controversy."

#### "FLAT STONES" AND "HEIGHT OF CURB" ORDINANCE

Judgments of confirmation of assessments made under the provisions of the Act of 1872 were reversed by the supreme court after the Act of 1897 went into force, because of the omission from the ordinance of the data from which the height of the curb could be determined. (See note under 24.)

#### SUPPLEMENTAL ORDINANCE TO CURE FORMER DEFECTS

After the reversal of the several confirmation judgments, the city council of Chicago passed a supplemental ordinance and made a new assessment under the provisions of sections 57, 58 and 60 of the Act of 1897. It was held, that a new assessment could be made under the new act, without an estimate being made, as required in the first instance under the ordinance. And further, it was held, that it was the duty of the city council to make a new assessment when the confirmation judgment is reversed, regardless of whether the cause is remanded or not.<sup>24</sup>

24—Gorton et al. v. Chicago, City of, 201 Ill. 534 (Af.).

Note: Holden et al. v. Chicago, City of, 172 Ill. 263 (R. R.); Jacob

et al. v. Idem, 178 Ill. 560 (R. R.); Lusk et al. v. Idem, 176 Id. 207 (R. R.); Dickey v. Idem, 179 Id. 184 (R. R.); Newkirk et al. v. Idem, 180

## ASSESSMENTS—SOLE CONDITION FOR MAKING

The *sine qua non* of a special assessment or a special tax.

The one condition upon which a special assessment or a special tax can repose upon public or private property is "benefit." Some benefit must be bestowed upon the property of the individual, that is not shared by the community at large. The test to be applied is: Will the proposed improvement enhance the market value of the property?<sup>25</sup> An apportionment of benefits between life estates and remainders does not enter into the question.<sup>26</sup>

If the property is limited to some special use, as for instance right of way of a railway company, the question is: Will the property, under its restricted use, be enhanced in value?<sup>27</sup>

Public property<sup>28</sup> and church property<sup>29</sup> are liable to be specially assessed.

It is not a valid objection against confirming an assessment roll that a right of way has not been condemned.<sup>30</sup>

Id. 142 (R. R.); Cruickshank et al. v. Idem, 181 Id. 415 (R. R.); Jarrett et al. v. Idem, 181 Id. 242 (R. R.); Libby et al. v. Idem, 187 Id. 189 (R. R.).

25—Thomas v. Chicago, City of, 152 Ill. 292 (Af.); Lightner v. Peoria, City of, 150 Ill. 80 (Af.); Clark v. Chicago, City of, 166 Ill. 84 (Af.).

26—Chicago Union Trac. Co. et al. v. Chicago, City of, 204 Ill. 363 (Af.).

27—Chicago Union Trac. Co. et al. v. Chicago, City of, 204 Ill. 363 (Af.); Chicago Union Trac. Co. v. Chicago, City of, 207 Ill. 544 (Af.); Washburn v. Chicago, City of, 198 Ill. 506 (Af.); Rich et al. v. Chi-

cago, City of, 152 Ill. 18 (Af. in pt., R. in pt.); Illinois Cent. R. R. Co. v. Decatur, City of, 126 Ill. 92 (Af.); Illinois Cent. R. R. Co. v. Mattoon, City of, 141 Ill. 32 (Af.); Illinois Cent. R. R. Co. v. Decatur, City of, 154 Ill. 173 (Af.); Chicago & N. W. Ry. Co. v. Elmhurst, 165 Ill. 148 (Af.); Cicero & Proviso St. Ry. Co. v. Chicago, City of, 176 Ill. 501 (Af.).

28—Adams, County of v. Quincy, City of, 130 Ill. 566 (Af.); McLean, County of v. Bloomington, City of, 106 Ill. 209 (Af.).

29—Chicago, City of v. Baptist Theological Union, 115 Ill. 245 (R. R.).

30—Hunerberg v. Hyde Park, Vil-

## CONTIGUOUS PROPERTY

The term "contiguous property" as used in the statute applies to special tax and not to special assessment.<sup>31</sup>

A special tax upon contiguous property will be sustained.<sup>32</sup>

## DIVISION INTO INSTALMENTS

In 1887 the legislature, in amending article nine of the Act of 1872 by adding thirteen more sections thereto, provided:

Section 55: "That the amount of any special assessment for any local improvement in any city, incorporated town or village may be divided into instalments, when so provided by the ordinance providing for the said improvement, the first of which shall not exceed the sum of 25 per cent of the total of said assessment, and which shall be due and payable from and after confirmation of said assessment. The remaining portion of said assessment, after deducting the said first instalment, shall be divided into four equal annual instalments, which said instalments shall be payable annually thereafter, and collected in the same manner that other assessments are now collected. Each of said four last named instalments shall bear interest at the rate of six per cent per annum from and after the first day of July next succeeding the confirmation of said assessment." Sec. 55, Ses. Laws, p. 104, 1887.

In 1891 the statute was amended and provision was made to collect special assessments in five instalments.

In 1893 the legislature passed an act authorizing the division of special assessments in cities, towns and vil-

lage of, 130 Ill. 156 (Af.); Holmes  
v. Hyde Park, Village of, 121 Ill.  
128 (Af.); Holt et al. v. East St.  
Louis, City of, 150 Ill. 530 (Af.).

31—Guild, Jr. v. Chicago, City of,  
82 Ill. 472 (Af.).

32—Lightner v. Peoria, City of,  
150 Ill. 80 (Af.).

lages into instalments, authorizing the issue of bonds to anticipate the collection of the deferred instalments.

Section 1: "That, whenever the corporate authorities of any city, town or village, have heretofore levied, or shall hereafter levy, any special assessment pursuant to law, it shall be lawful for such corporate authorities at any time prior to the commencing the collection thereof, to provide by ordinance that said assessment be divided into instalments, not more than seven in number, the first of which instalments shall be due and payable on and after confirmation thereof, and the second instalment one year thereafter, and so on until all are paid. But such division shall be so made that the first instalment shall include all the fractional amounts, leaving each of the remaining instalments equal in amount and multiples of \$100, which said assessment and instalments shall bear interest from and after 30 days succeeding the date of confirmation at the same rate, and be collected in like manner as is now provided by law." Ses. Laws, p. 78, 1893. As this statute did not refer to the Amendments of 1887 and 1891 and did not mention *special tax*, the question in its construction arose whether it was a part of the 9th art., ch. 24, of the Statute of 1872 and whether it was the intention to include under the term "assessment," "special tax," as well as "special assessment."

In *English v. Danville, City of*, 150 Ill. 92, it was held, that this act should be considered a part of article 9 and that the term "assessment" should include "special tax." <sup>33</sup>

In *Charleston, City of v. Cadle et al.*, 166 Ill. 487, it was held that the Act of 1893 authorizing the division of a special assessment into instalments, could not be resorted to for a support of a special assessment levied

<sup>33</sup>—*Lightner v. Peoria, City of*, v. *Chicago, City of*, 218 Ill. 18 150 Ill. 80 (Af.); *Goodrich et al.* (Af.).

to construct a drain under the Act of June 22, 1885, Laws of 1885, p. 60.

## INTEREST

No constitutional right is invaded by statute fixing rate of interest on the deferred payments of special assessments.<sup>34</sup>

## NEW AND SUPPLEMENTAL ASSESSMENT

The Statute of 1872, section 46, article 9, Chapter 24, R. S. 1874, provided for a new assessment, when a former assessment had been set aside by any court or annulled by a city council.<sup>35</sup>

Section 47 provided for a supplemental assessment, in case the first assessment proved insufficient.

Section 48 provided for a new or supplemental assessment, any time within five years from the date of the original confirmation judgment, in case the "city or village shall fail to collect the whole or any portion of any special assessment that may be levied."

This section, as held by the court in *Chicago, City of, Appellee v. Willoughby et al.*, 249 Ill. 249, substantially re-appears in section 60, Act of 1897 (p. 122).

In the Local Improvement Act of 1897, section 46 re-appears as section 57 (Ses. Laws, p. 121); section 47 re-appears as section 59 with a slight change.

In the Act of 1897 a new section (sec. 58) appears which provided that no special assessment shall be held void because levied for work already done, if it shall appear that such work was done in good faith, etc."

34—*Gage et al. v. Chicago, City of*, 216 Ill. 107 (Af. in pt.).

35—*Freeport St. Ry. Co. et al. v. Freeport, City of*, 151 Ill. 451 (Af.); *Morgan Park, Village of v. Gahan et al.*, 136 Ill. 515 (R. R.);

*Markley v. Chicago, City of*, 190 Ill. 276 (Af.); *Murray et al. v. Chicago, City of*, 175 Ill. 340 (Af.); *Goodrich et al. v. Chicago, City of*, 218 Ill. 18 (Af.).

Section 58 received a construction of the supreme court in *Chicago, City of v. Hulbert et al.*, 205 Ill. 346. Wherein the court observes:

"To authorize an ordinance for a new assessment under the foregoing section it must appear (a) that the work was done in good faith by contract duly let and executed pursuant to an ordinance providing that such improvement should be paid for by special assessment; (b) that the prior ordinance shall be held insufficient for the purpose of such assessment, or otherwise defective, so that the collection of the assessment therein provided for becomes impossible; (c) that the original assessment be set aside by some court; (d) that a new or special ordinance be passed providing for such new assessment; (e) that a new assessment be made and returned and like notice given and proceedings had as are required in relation to the first ordinance and assessment, except that the same need not be originated or presented by the board of local improvements." <sup>36</sup>

Sections 57 and 58 were construed by the supreme court in *Lincoln, City of, Appellee v. Harts, et al.*, 256 Ill. 253 (R.), and it was held that if the ordinance, under which the former work was done, was void and not merely defective, a supplemental assessment could not be levied.

To meet this holding, the legislature in 1913 (Laws of 1913, p. 166) amended sections 57 and 58. The purpose of the amendment was that cities might provide for the payment of the cost of improvements that had been constructed under void ordinances.

Section 59 was again amended in 1919. See *Ses. Laws*, p. 644.

36—*Chicago, City of v. Galt*, 225 Ill. 368 (R. R.); *Chicago, City of v. Hulbert et al.*, 205 Ill. 346 (R. R.); *Chicago, City of Clark*, 233 Ill. 404 (Af.).

## CERTIFICATE OF IMPROVEMENT BOARD—SECTION 84

The statute provides that within 30 days after the final completion and acceptance of the work the board shall certify to the court in which the assessment was confirmed the cost of the same, together with the amount "estimated by the board to be required to pay the accruing interest on bonds or vouchers issued to anticipate collection, and thereupon, if the total amount assessed for said improvement upon the public and private property exceeds the cost of the same, all of said excess, excepting the amount required to pay such interest as herein provided for, shall be abated and the judgment reduced proportionately to the public and private property owners, and shall be credited pro rata upon the respective assessments for said improvements under direction of the court, and, in case the assessment is collectible in instalments, such reduction shall be made so that all instalments shall be equal in amount, except that all fractional amounts shall be added to the first instalment, so as to leave the remaining instalments in the aggregate equal in amount and each a multiple of one hundred dollars."

The statute further provides that the board, when an assessment is divided into instalments, certify to the court whether or not the improvement conforms substantially to the requirements of the original ordinance and to make an application to the court to hear and determine that question in a summary manner, after giving property owners 15 days notice of the time and place of the hearing. The statute provided that the order made by the court shall be conclusive upon the parties and no appeal therefrom or writ of error there-to shall be allowed.

In *Peoria, City of, Appellant v. Smith*, 232 Ill. 561 (Af.), it was held, that the provision of the statute with reference to the conclusiveness of the county's court

judgment did not apply to the question of dividing the rebate among the several property owners.

See *People ex rel. v. Cohen et al.*, 219 Ill. 200 (R. R.), and *People ex rel., Appellee v. Martin et al.*, 243 Ill. 284 (Af.), where an unsuccessful attack was made upon the validity of section 84.

#### IMPROVEMENT BOARD

The Act of 1897, section 6, as finally amended in 1901, provided that in cities of 100,000 or more there was created a "board of local improvements," consisting of the superintendent of special assessments and four other members. In cities having more than 50,000 and less than 100,000 the board consists of five members, to wit: Commissioner of public works, superintendent of streets, superintendent of sewers, superintendent of special assessment and the city engineer.

In cities of less than 50,000 the mayor, the public engineer and the superintendent of streets constitute the board, except where the commission form of government has been adopted. Sec. 23 of Art. 13, as amended in 1917, p. 284, discontinues the board of local improvements, as held in *Chrisman, Appellee v. Cusick*, 290 Ill. 297 (R. R.).

#### DESCRIPTION OF IMPROVEMENT

Description of an improvement in a resolution may be less specific than in the ordinance based thereon.

An improvement ordinance provided for "curbing, grading and paving with asphalt Cornelia Avenue from Robey Street to West Ravenswood Park in the City of Chicago."

The record of the improvement board was attacked because: "(a) No width of roadway is established; (b) the thickness of the asphalt wearing surface is not given; (c) the public hearing resolution is not for the same



improvement shown in the first resolution; (d) nothing is shown as to the establishment of the grade lines to which the completed improvement must conform."

The court in sustaining the indefiniteness of description in the improvement board record declare: "The manifest object of creating such a board, and of the proceedings before it, is to prevent hasty, ill-advised or secret action by city authorities without giving to the property owners whose interests are involved an opportunity to be heard. It is the duty of a board of local improvements to hear the objections of property owners and to consider their rights and protect their interests, and that is the object of a public hearing." \* \* \*

"The object of the statute is attained if the description of the improvement is such as to give property owners a general understanding of what is proposed to be done and the estimated cost, and that is all the language of the statute requires. (Walker v. City of Chicago, 202 Ill. 531; Lanphere v. City of Chicago, 212 Ill. 440; McLennan v. City of Chicago, 218 Ill. 62.) If it is finally decided to make the improvement and an ordinance is prepared under which contracts are to be let and an assessment levied, a description more in detail must necessarily be given, and the provision of the statute as to such description is quite different."

"The improvement proposed in this case is the curbing, grading and paving with asphalt of the roadway of Cornelia Avenue and the roadways of intersecting streets and alleys. The width of the roadway is not specified in the proceedings, and the objection is, that the width is therefore indefinite and incapable of being ascertained. The width of the street is fixed and certain. \* \* \* When reference is made to an object or thing as fixed and existing which has locality, width and dimensions, the presumption is that it can be found and located and there is no patent ambiguity in the description."

To the point that the thickness of the asphalt wearing surface is not given, the court replies: "In the case of *Gage v. City of Chicago*, 207 Ill. 56, a resolution for grading and paving a street was considered sufficient although it did not specifically mention the binder course of broken limestone or the wearing surface of asphalt, and under that decision failure to mention the thickness of the wearing surface in this case is not a good objection."

To the point that the resolution contained no reference to the grade at which the pavement should be laid, the reply of the court was: "The estimate of cost contains an item of 600 cubic yards of grading." This gave the property owners information of the amount of grading and the cost. The grade would be determined by reference to some other ordinance, when the location of the improvement is definitely settled and fixed upon. This is information needed by the engineer, in making the specifications for the improvement and could be obtained from the records of the city, other than that of the improvement board.<sup>37</sup>

#### POWERS OF THE IMPROVEMENT BOARD

The improvement board has power and its duty is (a) to originate a scheme for any local improvement with or without a petition of the property owners; (b) to adopt a resolution describing the proposed improvement; (c) to fix a day and hour for a public hearing not less than ten days after adoption of the resolution; (d) to cause an estimate of the cost of the improvement to be made in writing by the engineer (or its president in the absence of such an officer) and over his signature; (e) to publish notice of the public meeting by posting

37—*Ogden, Sheldon & Co. v. Chicago, City of*, 224 Ill. 294 (Af.).

notices in at least four conspicuous places in the vicinity of the proposed improvement; (f) when the board acts, upon its own initiative and without a petition of property owners, to send by mail a like notice to persons paying the "general taxes for the last preceding year on each parcel fronting on the improvement proposed;" (g) at the public meeting, to hear objections, if any, of property owners to the "proposed improvement or any of the elements thereof;" (h) if property owners do interpose objections, to abandon, modify or adhere to the proposed scheme (provided change does not increase cost 20 per cent); (i) if the scheme of improvement is not abandoned, to draft and submit to the city council an ordinance and with it "a recommendation of such improvement by the said board, signed by at least a majority of the members thereof;" (j) together with the ordinance and the recommendation, to submit an itemized estimate of the cost of the improvement. Sections 7 and 8.<sup>38</sup>

Failure to receive the notice does not affect rights of property owner in a proceeding under sections 57 and 58, Act 1897 to assess "unpaid balance of the cost of a cement sidewalk." So held in *Chicago, City of v. Galt*, 225 Ill. 368.

Appearing and filing objections is a waiver of the defects in the notice.

#### RECOMMENDATION OF THE BOARD

The recommendation by said board shall be prima facie evidence that all preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceedings unless the court shall deem

38—*Chicago, City of v. Kerfoot & Co.*, 208 Ill. 387 (R. R.); *McChesney et al. v. Chicago, City of*, 205 Ill. 611 (Af.); *Washburn v. Chicago, City of*, 198 Ill. 506 (Af.).

the same wilful or substantial. Section 9, 1897. The recommendation of the board is *prima facie* evidence of the presentation of a petition by property owners. *Richards v. Jerseyville, City of*, 214 Ill. 67 (Af.).<sup>39</sup>

#### CONTENTS OF THE IMPROVEMENT BOARD'S RECORD

The resolution must contain, (a) a description of the proposed improvement; (b) if private property is to be taken or damaged, it must contain a description of such property; (c) it must show the "day" and "hour" of the public meeting; (d) it must show the itemized estimate of the cost of the improvement. Section 7, Act of 1897.

Sufficient if resolution describes improvement in general terms and not as much in detail as in the ordinance to follow.<sup>40</sup>

With reference to *variance* between resolution and ordinance see: *Chicago, City of, Appellant v. MacChesney et al.*, 240 Ill. 174 (R. R.).

Resolution need not contain as detailed description as the ordinance: *Chicago, City of v. Soukup, Appellee*, 245 Ill., page 634 (R. R.).

#### VARIANCE

Not a variance between resolution and ordinance because the latter and not the former describes the district to be drained.<sup>41</sup>

39—*Chicago, City of, Appellant v. LeMoynes et al.*, 243 Ill. 379 (R. R.).

40—*McLennan et al v. Chicago, City of*, 218 Ill. 62 (Af.); *Ogden, Sheldon & Co. v. Chicago, City of*, 224 Ill. 294 (Af.); *Gage v. Chicago, City of*, 207 Ill. 56 (Af.); *Lan-*

*phere v. Chicago, City of*, 212 Ill. 440 (Af.); *McChesney et al. v. Chicago, City of*, 227 Ill. 215 (Af.); *Walker et al. v. Chicago, City of*, 202 Ill. 531 (Af.); *Gage v. Chicago, City of*, 201 Ill. 93 (Af.).

41—*MacChesney et al. v. Chicago, City of*, 227 Ill. 215 (Af.).

## APPOINTMENT OF COMMISSIONERS

The statute was silent (section 23, article 9, chapter 24, Act 1872) as to the term at which the commissioners should be appointed by the county court. An appointment made at the probate term, though it had been previously held that the application for confirmation of the assessment must be at a law term, was sustained.<sup>42</sup>

## COMMISSIONERS—POWERS AND DUTIES

The act of the commissioners in fixing the relative amount of the cost of an improvement between the municipality and the owners of property is conclusive.<sup>43</sup>

The statute has not prescribed any basis on which the commissioners shall estimate benefits and the cost of an improvement and they cannot be called to impeach their own report.<sup>44</sup>

Not necessary that all members of the improvement board be present when the board acts. Nor that there be unanimity among them.<sup>45</sup>

Commissioners appointed by the court to levy a special tax are not employees of the city but officers of the court and their fees can be taxed as other costs in the case.<sup>46</sup>

## CONSTITUTION

To the point that the Local Improvement Act does not provide for notice to be sent to the land owner and does therefore deprive him of his property "without due

42—*Murphy v. Peoria, City of*, 119 Ill. 509 (Af. in pt., R. in pt.).

43—*Walters et al. v. Lake, Town of*, 129 Ill. 23 (Af.); *Billings et al. v. Chicago, City of*, 167 Ill. 337 (Af.).

44—*Lathem et al. v. Wilmette*, S. P.—23

*Village of*, 168 Ill. 153 (Af.); *Quick v. River Forest, Village of*, 130 Ill. 323 (Af.).

45—*Gage et al. v. Chicago, City of*, 192 Ill. 586 (Af.).

46—*Kimble et al. v. Peoria, City of*, 140 Ill. 157 (Af.).

process of law," the court replies: "The Local Improvement Act provides for notice of the time and place of the public hearing to be sent by mail to the person who paid the taxes on the property assessed for the last preceding year; also notice of the passage of the ordinance for the improvement to be sent by mail to the person who paid the taxes for the last preceding year and a like notice to the occupant of the premises; also a notice of the pendency of the proceeding for confirmation to be sent by mail to the person who paid the taxes during the last preceding year in which taxes were paid; and for a further notice, by posting the same and publication in a newspaper, giving notice of the proceeding to all persons interested and notifying them that they may file objections. These notices satisfy the requirements of the constitution, and afford to the owner of the property, and all persons interested in it, an opportunity to appear and contest the justice, legality and propriety of the proposed improvement." <sup>47</sup>

#### ORDINANCE IN REFERENCE TO SIDEWALKS

It is not unconstitutional for the legislature to provide that in case of sidewalks, the improvement board "may submit to the city council or board of trustees, as the case may be, an ordinance, together with its recommendation and the estimated cost of the improvement" without the intervention of a public hearing. <sup>48</sup>

Where an ordinance is susceptible of two constructions, one of which will defeat and the other support the ordinance that construction that will support the ordinance should be adopted. *Benton, City of v. Blake et al.*, 263 Ill. 358 (R. R.).

<sup>47</sup>—*Gage v. Chicago, City of*, 225 Ill. 218 (Af.); *Citizens' Savings Bank & Tr. Co. et al. v. Chicago, City of*, 215 Ill. 174 (Af.).

<sup>48</sup>—*Gage et al. v. Chicago, City of*, 203 Ill. 26 (Af.).

Under the Constitution of 1870 "the power to make special assessments for local improvements cannot be referred to and sustained under the right of eminent domain." Both special assessments and special taxation are a branch of the taxing power. In construing statutes that exempt from general taxation, it is held that "special assessment" and "special taxation" are not included.<sup>49</sup>

## ENGINEER'S ESTIMATE

The engineer's estimate of the cost of the improvement must be itemized "to the satisfaction of said board," in writing signed by him. See form of estimate set out in the resolution.<sup>50</sup>

An estimate is sufficiently itemized if it gives the component elements of the improvement; gives a general idea without particularizing.<sup>51</sup>

The estimate need not appear, from the improvement board record, to have been approved.<sup>52</sup>

It does not amount to a variance between the engineer's estimate and the ordinance that the estimate names a definite number of lineal feet of curb stone at a certain price per foot including "labor, material and all other expenses attending the same," but does not "itemize the cost of filling a space at the back of the

49—Adams, County of v. Quincy, City of, 130 Ill. 566 (Af.).

50—Jones et al. v. Chicago, City of, 213 Ill. 92 (Af.).

51—Chicago, City of v. Singer et al., 202 Ill. 75 (R. R.); Chicago, City of v. Soukup, 245 Ill. 634 (R. R.); Clark v. Chicago, City of, 214 Ill. 318 (Af.); Conn. Mut. Life Ins. Co. v. Chicago, City of, 217 Ill. 352 (Af.); Gage v. Chicago, City of, 207 Ill. 56 (Af.); Hulbert v.

Chicago, City of, 213 Ill. 452 (Af.); Lanphere v. Chicago, City of, 212 Ill. 440 (Af.); McChesney et al. v. Chicago, City of, 227 Ill. 215 (Af.); Northwestern University et al. v. Wilmette, Village of, 230 Ill. 80 (Af.); Oak Park, Village of v. Galt, Appellant, 231 Ill. 365 (Af.); 231 Ill. 482 (Af.); Rollo et al. v. Chicago, City of, 187 Ill. 417 (Af.).

52—Chicago, City of v. Kerfoot & Co., 208 Ill. 387 (R. R.).

curb stones with earth filling," as provided in the ordinance.<sup>53</sup>

#### NOTICES

The notices sent (section 7, Act 1897, amended 1901, p. 103) by the improvement board must contain: (a) The substance of the resolution adopted by the board; (b) the estimate of the cost of the proposed improvement; (c) a notification that the extent, nature, kind, character and estimated cost of such proposed improvement may be changed by said board at the public consideration thereof.

A notice is sufficient that contains the substance of the resolution; the engineer's signature may be omitted.<sup>54</sup>

The notice need not contain the words: "If upon such hearing the board shall deem such improvement desirable it shall adopt a resolution therefor."<sup>55</sup>

#### JUDGMENT

A judgment in a condemnation proceeding brought to have determined "the just compensation for property taken or damaged" is collateral to the supplemental proceeding under section 53, article 9, Act of 1872.

In a supplemental proceeding brought for the purpose of having a special assessment spread to raise an amount sufficient to pay the damages, etc., the affidavit that supported the publication notice stated: defendants A., B., and C., "after diligent search and inquiry" cannot be found within the State of Illinois and "that the

53—Chicago, City of v. Singer et al., 202 Ill. 75 (R. R.); Chicago, City of v. Soukup et al., 245 Ill. 634 (R. R.).

54—Lanphere v. Chicago, City of,

212 Ill. 440 (Af.); Gage v. Chicago, City of, 201 Ill. 93 (Af.).

55—Gage v. Chicago, City of, 201 Ill. 93 (Af.); Walker et al. v. Chicago, City of, 202 Ill. 531 (Af.).



places of residence of the said above named defendants are to said deponent unknown, and cannot after diligent search and inquiry be ascertained."

It was held that though the affidavit did not aver that the defendants were non-residents, on collateral attack it was sufficient to authorize a publication.<sup>56</sup>

A judgment in a condemnation proceeding is several as to each piece of land.<sup>57</sup>

A judgment confirming a special assessment is *in rem* and the benefits cannot be apportioned between the leasehold estate and the freehold estate.<sup>58</sup>

#### JURISDICTION

##### SUPPLEMENTAL ASSESSMENT—NO PUBLIC HEARING NECESSARY

Preliminary steps to supplemental assessment: Under section 59 of the Act of 1897, under a petition for a supplemental assessment to raise the amount of a deficiency cost of curbing, grading, and paving a street, it is not fatal to the jurisdiction of the court that the Board of Local Improvement has failed to give notice of a public hearing, as none of those preliminary steps leading up to the order of the court are practical or essential to the rights of the individuals.<sup>59</sup>

##### SECTIONS 57 AND 58, NEW ASSESSMENT

In *Chicago, City of v. Galt*, 225 Ill. 368, the question arose, in an application for a new assessment under sections 57 and 58 of the Act of 1897, of the affect of a failure of the engineer to properly itemize the estimate of cost of a cement sidewalk, upon the ordinance thereafter passed by the city council.

56—*Allen et al. v. Chicago, City of*, 176 Ill. 113 (Af.).

*al. v. Chicago, City of*, 204 Ill. 363 (Af.).

57—*Allen et al. v. Chicago, City of*, 176 Ill. 113 (Af.).

59—*Chicago, City of v. Noonan et al.*, 210 Ill. 18 (R. R.).

58—*Chicago Union Trac. Co. et*

It was contended on behalf of the property owner that the ordinance was thereby rendered void for the reason that this requirement of the statute was mandatory and reliance was had upon *Clarke v. Chicago, City of*, 185 Ill. 354; *Bass v. Chicago, City of*, 195 Ill. 109; *Bickerdike v. Chicago, City of*, 203 Ill. 636; and *Becker v. Chicago, City of*, 208 Ill. 126.

To this contention the court replies: "In those cases it was held that the particular mode provided by the statute for the levy of a special assessment must be pursued, and that the ordinance will not authorize an assessment until all the preliminary requirements of the statute have been complied with. Language was used to the effect that the proceedings prior to the adoption of the ordinance are jurisdictional, without which no valid ordinance can be passed, and, in effect that the ordinances were void and the court without jurisdiction to proceed, but in none of them was the question whether the ordinance *was void and a nullity*, or merely insufficient and defective, in any manner involved. The actual decision in each case was, that the provisions of the statute for the protection of the property owner are *mandatory* and must be strictly complied with. The preliminary requirements of the law are jurisdictional in the sense that they are essential steps in the proceeding culminating in a special assessment, but it was not held in any case that the county court had no jurisdiction to act at all or to hear and determine the controversy."

#### GALT CASE AND STEIN CASE DISTINGUISHED

This case is to be carefully distinguished from *Chicago, City of v. Stein*, 252 Ill. 409, where it was held on direct attack there was no jurisdiction of the subject matter, because there was no legal and proper evidence of the publication of the statutory notice of the application to have the assessment roll confirmed.

In the Stein case, the publisher's certificate, which is analogous to a sheriff's return on process, was absent from the record; in the Galt case an estimate of the engineer with defects that might have been corrected or amended at the time, if the court's attention had been called thereto, did appear in the record. The rule is that objections that raise preliminary questions must be made in the court below and at the earliest opportunity.

#### OBJECTIONS

Objections filed, unless to matter appearing of record, must be sustained by proof.<sup>60</sup> The proof to be reviewed on error or appeal must be preserved by bill of exceptions.<sup>61</sup> When the lower court refuses to allow proof upon any subject, the party against whom the ruling is made should offer the evidence to be incorporated in the record in order to have a review of the ruling.

#### DEFAULTS

On application to set aside a default, it must appear "by affidavit or otherwise" that there has been no negligence and that there exists a meritorious defense. *Gage v. Chicago, City of*, 211 Ill. 109 (Af.).<sup>62</sup>

#### PRACTICE—PRIMA FACIE CASE

In meeting the objection: "That it was error for the court to instruct the jury that the assessment roll was prima facie evidence to sustain the assessment," the court observes: "The assessment roll makes out a

60—*Enos et al. v. Springfield, City of*, 113 Ill. 65 (Af.).

61—*Trigger v. Drainage Dist.*, 193 Ill. 230 (Af.).

62—*Citizens' Savings Bank & Tr. Co. et al. v. Chicago, City of*, 215 Ill. 174 (Af.).

prima facie case, and the commissioners are not required to resort to other evidence, except such as may be necessary to meet the evidence introduced by the objectors to impeach the assessment." <sup>63</sup>

The petition, with certified copy of the ordinance attached, the assessment roll with the affidavit of mailing and posting notices and the proof of publication constitute, when introduced, in evidence, a prima facie case. <sup>64</sup>

A commissioners' report is prima facie evidence of a valid assessment. <sup>65</sup>

In determining whether a prima facie case has been made, a certified copy of an ordinance is sufficient. The burden is on the objector to offer evidence showing, or tending to show, any statutory omissions in the passage of the ordinance. <sup>66</sup>

The point was raised, whether the court had ruled properly in directing the jury to return a verdict for the petitioner. After the petitioner had made a prima facie case, the court inquired of the defendants to the petition whether they desired to offer any evidence. The reply was: "We have no witnesses." The court prior to the hearing before the jury had declined to grant a continuance on affidavits filed by the land owners but said at the same time that the petitioner would be required to admit that the witnesses, on the strength of whose absence a continuance was sought, would testify to the facts stated in the affidavits filed for continuance. As these affidavits were not offered before the jury, it

63—*Lovell et al. v. Sny Island Levee Drain. Dist.*, 159 Ill. 188 (Af.).

64—*Porter v. Chicago, City of*, 176 Ill. 605 (Af.); *McChesney et al. v. Chicago, City of*, 205 Ill. 611 (Af.).

65—*Chicago, R. I. & P. Ry. Co. v. Chicago, City of*, 139 Ill. 573 (Af.);

*Green et al. v. Springfield, City of*, 130 Ill. 515 (Af.); *McVey et al. v. Danville, City of*, 188 Ill. 428 (Af.); *Briggs et al. v. Union Drainage Dist.*, 140 Ill. 53 (Af.); *Trigger v. Drainage Dist.*, 193 Ill. 230 (Af.).

66—*Lindsay v. Chicago, City of*, 115 Ill. 120 (Af.).

was held on review that the court did not err in directing a verdict for the petitioner.<sup>67</sup>

## PETITION

When the ordinance provides for the taking of private property the statute requires a petition to be filed by "some officer" named by "ordinance" or "order" in a court of record. The petition must contain (a) a reasonably accurate description of lots, blocks, tracts and parcels of land which shall be taken or damaged; (b) there shall be filed with or attached to the petition a certified copy of the ordinance (if the ordinance provides for the levying of a special assessment); (c) a copy of the recommendation of the board of local improvements; (d) an estimate of the cost, as approved by the legislative body.<sup>68</sup>

It is not necessary that the petition aver that the compensation for land taken could not be agreed upon by the parties in interest.

A default confirmation judgment was reviewed on error. A defect in the certificate of the clerk to the ordinance attached to the petition was assigned as error. The court held the certificate of the clerk was no part of the ordinance, and in the absence of a bill of exceptions the presumption would be indulged that other proof was heard to establish the validity of the ordinance.<sup>69</sup>

Supplemental petition under section 53, article 9, Act 1872, for an assessment need not recite ordinance for improvement.<sup>70</sup>

67—*Franklin Park, Appellee v. Trustee v. Chicago, City of*, 164 Ill. Franklin et al., 231 Ill. 380 (Af.). 37 (Af.).

68—*Walker et al. v. Aurora, City of*, 140 Ill. 402 (Af.). 70—*Pearson et al. v. Chicago, City of*, 162 Ill. 383 (Af.); *Allen et al. v. Chicago, City of*, 176 Ill.

69—*Wadlow v. Chicago, City of*, 159 Ill. 176 (Af.); *Dickey, Jr.*, 113 (Af.).

A grade ordinance may be referred to in the petition without being set out.<sup>71</sup>

Filing petition gives court jurisdiction.<sup>72, 73</sup>

#### PRESUMPTIONS

Though the petition does not aver that the commissioners who were appointed to make the estimate, were competent, it will be presumed that the city did its duty in appointing persons who were competent.<sup>74</sup>

The presumption arising from the report of the superintendent of special assessments is, that the omitted property will not be benefited and this presumption is not overcome by the fact that lot 46 abuts on the proposed improvement.<sup>75</sup>

The statute requires the commissioners in the assessment roll to state the names of the owners. In one case they stated as owners "Thomas Middleton heirs" and "J. Flack estate." It was held that the presumption would be indulged that they did not know the names, nor were they able to ascertain them by the exercise of reasonable diligence.<sup>76</sup>

An ordinance provided that a granite-concrete combined curb and gutter shall be constructed on each side of the roadway of a street. The presumption will be

71—Parker et al. v. LaGrange, Village of, 171 Ill. 344 (Af.); Carlinville, City of v. McClure, 156 Ill. 492 (R. R.); Haley et al. v. Alton, City of, 152 Ill. 113 (Af.).

72—Rich et al. v. Chicago, City of, 152 Ill. 18 (Af. in pt., R. in pt.).

73—Rich et al. v. Chicago, City of, 152 Ill. 18 (Af. in pt., R. in pt.).

Whether property is specially benefited by an improvement is a question of fact. C. R. I. & P. R. Co. v. Chicago, City of, 139 Ill. 573.

74—Walker et al. v. Aurora, City of, 140 Ill. 402 (Af.); White et al. v. Alton, City of, 149 Ill. 626 (Af.).

75—Sheedy v. Chicago, City of, 221 Ill. 111 (Af.).

76—White et al. v. Alton, City of, 149 Ill. 626 (Af.).

If an ordinance has been properly passed all presumptions are in favor of its reasonableness. Chicago, City of v. Marsh, 238 Ill. 254.

indulged that the engineer excepts, though he does not say so, the street and alley intersections from the amount of curbing in lineal feet required.<sup>77</sup>

## NO BILL OF EXCEPTIONS

In the absence of a bill of exceptions, it will be presumed that the court below had before it evidence that the commissioners had taken the oath required by statute, notwithstanding that the one copied into the record is defective.<sup>78</sup>

A motion was made to have an assessment re-cast, because the commissioners had omitted property "benefited about \$2,500." The denial of the motion was sustained, because: "Commissioners appointed to spread an assessment roll are required to exercise their judgment and discretion in so doing. The power of spreading an assessment roll is, by the statute, conferred on them under their appointment by the court. The *presumption* will be that they discharged their duty and exercised a sound judgment and discretion."<sup>79</sup>

If an ordinance has been properly passed all presumptions are in favor of its reasonableness. *Chicago, City of v. Marsh*, 238 Ill. 254.

The presumptions are all in favor of the reasonableness of an ordinance, and it will not be declared void therefore unless it is manifestly so.<sup>80</sup>

When a variance, if any, between the proposed improvement and the ordinance can only be ascertained from evidence not in the record, the presumption will be indulged that there was no substantial variance.<sup>81</sup>

77—*Rollo et al. v. Chicago, City of*, 187 Ill. 417 (Af.).

78—*Gross v. Village of Grossdale*, 176 Ill. 572 (Af.); *Kelly et al. v. Chicago, City of*, 148 Ill. 90 (Af.).

79—*Allen et al. v. Chicago, City of*, 176 Ill. 113 (Af.).

80—*Myers et al. v. Chicago, City of*, 196 Ill. 591 (Af.); *Jones et al. v. Chicago, City of*, 213 Ill. 92 (Af.).

81—*Delamater et al. v. Chicago, City of*, 158 Ill. 575 (Af.).

## RECORD OF IMPROVEMENT BOARD

The improvement board record is more especially for the benefit of the property owner, so that he can obtain a general idea of what is to be done and an estimate of the cost.<sup>82</sup>

The ordinance is more especially for the benefit of the engineer and the description therein must be sufficiently definite to enable a contract to be let.

Recitals. Not necessary that the improvement board record contain recital of facts showing that notices as required by statute have been sent.<sup>83</sup>

Improvement board record. Contents: The record of the improvement board will be sustained although the resolution does not show the several items of cost in the engineer's estimate. Under section 9 of the Act of 1897 the presumption is that these preliminary requirements have been performed.<sup>84</sup>

The improvement board may limit the extent of the field of improvement without calling another public hearing; though it can lessen the cost but cannot increase it to exceed 20 per cent.<sup>85</sup>

The engineer's estimate must be made a part of the record but it is not necessary that the "preamble and the engineer's signature" should be embodied in the record.<sup>86</sup>

## RECORD PROPER—PRACTICE

Objections were made to the introduction of certain ordinances. The court held that the ruling of the lower

82—Gage v. Chicago, City of, 225 Ill. 218 (Af.).

83—Chicago Union Trac. Co. et al. v. Chicago, City of, 202 Ill. 576 (Af.).

84—Wells v. Chicago, City of, 202 Ill. 448 (Af.).

85—Washburn v. Chicago, City of, 198 Ill. 506 (Af.); McChesney et al. v. Chicago, City of, 205 Ill. 611 (Af.).

86—Lanphere v. Chicago, City of, 212 Ill. 440 (Af.).



court could not be reviewed because the record did "not purport to contain all the evidence" heard below.<sup>87</sup>

In a proceeding to levy and collect a special tax, the city made a motion to amend which was denied. On review the supreme court held that the amendment should be allowed and reversed the case with directions to allow the amendment and proceed in conformity with the views expressed.

When the cause was reinstated in the court below and the amendment allowed, the property owners interposed objections. In sustaining the right to interpose further objections, the supreme court observes: "In so far as the remanding order contained specific directions, the court below had no discretion, but was bound to carry out the mandate of this court. \* \* \* Beyond that, the county court was at liberty to take further proceedings, with this limitation that in so doing, it should be controlled and guided by the rules of law established by this court in its decision. That certainly did not preclude the parties from raising questions, if any existed, which had not been submitted to and had not received the consideration of the court."<sup>88</sup>

The reversal of the confirmation judgment in favor of one property owner will have no effect upon those who did not join in the proceeding for a review.<sup>89</sup>

#### SPECIAL TAX DEFINED

The first position the court took in defining a special tax was that it must be levied upon contiguous property without regard to the question whether the benefit would equal the assessment.<sup>90</sup>

87—Grey et al. v. Cicero, Town of, 177 Ill. 459 (Af.).

88—Green et al. v. Springfield, City of, 130 Ill. 515 (Af.).

89—Kelly et al. v. Chicago, City of, 148 Ill. 90 (Af.).

Under Sec. 51, Act of 1897, a special assessment may be confirmed at a law or probate term of the county court. Rossville, Village of v. Smith, 256 Ill. 302.

90—Galesburg, City of v. Searles

"The object of special taxation is not to have each lot pay for the actual cost of what is done in front of it, but its proportionate share of the whole."<sup>91</sup>

Special tax may be made payable in instalments. Section 17 of the Act of 1872 (Art. 9, Ch. 24, R. S. 1874, p. 234), provided that a special tax should be "levied, assessed and collected" in the same manner as special assessments. Under the amendments (Laws of 1887, p. 107, 1891, p. 91, and 1893, p. 78) to article 9 (Act of 1872), allowing a special assessment to be divided into instalments, it is held that a special tax can be divided into instalments.<sup>92</sup>

See distinction between special tax, special assessment and general tax pointed out by reference to Judge Cooley's work on Taxation in *Crane et al. v. West Chicago Park Com.*, 153 Ill. 348.

"Contiguous," as used in the statute may be defined as "in actual or close contact," "touching," "adjacent" or "near."<sup>93</sup>

#### SPECIAL TAX PRE-SUPPOSES SPECIAL BENEFIT

Whether a special tax exceeded the actual benefits was not a material question, prior to the amendment to section 17, article 9, R. S. 1874. The city council's determination to impose the tax was considered, of itself, a finding that the benefits to flow therefrom would equal the burden inflicted.<sup>94</sup>

et al., 114 Ill. 217 (R. R.); *Enos et al. v. Springfield, City of*, 113 Ill. 65 (Af.); *Springfield, City of v. Green et al.*, 120 Ill. 269 (R. R.).

91—*Green et al. v. Springfield, City of*, 130 Ill. 515 (Af.).

92—*English v. Danville, City of*, 150 Ill. 92 (Af.); *Lightner v. Peoria, City of*, 150 Ill. 80 (Af.).

93—*Adams, County of v. Quincy, City of*, 130 Ill. 566 (Af.).

94—*White v. People*, 94 Ill. 604 (Af.); *Craw v. Tolono*, 96 Ill. 255 (R. R.); *Adams v. Quincy*, 130 Ill. 566 (Af.); *Chicago & Alton Railroad Co. v. Joliet, City of*, 153 Ill. 649 (Af.); *Enos v. Springfield, City of*, 113 Ill. 65 (Af.); *Green v.*

See special tax differentiated from special assessment under number <sup>95</sup> unsuccessful direct attack.

SECTION 17, ARTICLE 9, R. S. 1874

In 1895 the legislature (Ses. Laws, p. 100) amended the 17th section of article 9, under which clause, prior to that time the findings of city councils with reference to the amount of a special tax that could be imposed upon the property, had been held conclusive. On that date to this clause, as it had formerly read, was added: "Provided, that no special tax shall be levied or assessed upon any property to pay for any local improvement, in an amount in excess of the special benefit which such property shall receive from such improvement. Such ordinance shall not be deemed conclusive of such benefit, but the question of such benefit and the amount of such special tax shall be subject to the review and determination of the county court, and be tried in the same manner as in proceedings by special assessment."

In the revision of the Local Improvement Statute of 1897, section 17, of the Act of 1872, as amended appears as section 35 (Ses. Laws, p. 114).

The only change that this amended section has made in the practice of levying assessments is: To allow the property owner to have the question, whether the property is benefited to the extent of the special tax imposed, submitted to a jury. The fixing by the city council of

Springfield, City of, 130 Ill. 515; Lightner v. Peoria, City of, 150 Ill. 80 (Af.); Springfield, City of v. Green, 120 Ill. 269 (R. R.); Wilbur et al. v. Springfield, 123 Ill. 395 (Af.).

95—Fisher et al. v. Chicago, City of, 213 Ill. 268 (Af.); St. John v. East St. Louis, City of, 50 Ill. 92 (R. R.); Yaggy et al. v. Chicago,

City of, 192 Ill. 104 (Af.); Jones v. Chicago, City of, 206 Ill. 374 (Af.); Adams, County of v. Quincy, City of, 130 Ill. 566 (Af.); Guild, Jr. v. Chicago, City of, 82 Ill. 472 (Af.); Lingle v. West Chi. Park Com'rs, 222 Ill. 384 (Af.); Chicago & N. W. Ry. Co. v. Chicago, City of, 148 Ill. 141 (Af.).

the proportion of the cost of the improvement between the public and the property owner is conclusive, as it was prior to the amendment in 1895, and is not now subject to review by the court.<sup>96</sup>

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96—Birket et al. v. Peoria, City of, 185 Ill. 369 (Af.); Peru, City of v. Bartels et al., 214 Ill. 515 (R. R.).

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## CHAPTER XIX

### SPECIAL ASSESSMENTS

#### SUCCESSFUL COLLATERAL ATTACK UPON CONFIRMATION JUDGMENT

Prior to the Statute of 1857, amending the Charter of the City of Chicago, it was not necessary for cities to resort to a court of law for the purpose of collecting their general and special taxes. The only way prior to 1857 for reviewing the action of the city council was by a writ of certiorari.

In the case of *Pease v. City of Chicago*, 21 Ill. 500, the question was presented to the supreme court whether the property owner could interpose any defense to a special assessment on an application for a judgment under the law, as amended in 1857. In holding that the property owner could interpose a defense, the court used this language:

“Here (referring to Amendment of 1857, page 892), there is an express provision that the owner or person interested in the land may make a defense and it cannot, we think, be reasonably contended that such defense shall not embrace everything which shows that the tax or assessment, to collect which the proceeding was instituted, ought to be collected. Less than this would be a mockery of justice. Anything, which a court of law could examine into under a writ of certiorari may be considered on this trial, and even more, for the court may inquire *de hors* the proceeding of the common council and see if any facts exist which render the tax or assessment illegal, as well as into any substantial irregularity in

the mode of assessing it, for which a court of law would set them aside."

Defense: "It was proved on the trial that a part of the improvement, for which the assessment was levied, had already been made by private parties, without any contract with or liability by the city authorities, and this assessment was levied in part for the purpose of collecting money to pay for such improvements already voluntarily executed. For this purpose the law gave the common council no authority to levy a special assessment upon property deemed benefited by the improvement already executed. "As that assessment was levied in part to pay for improvements already executed, without the order or direction or liability of the common council, it was not warranted by the law, and the court erred in rendering judgment for it." •

In *City of Chicago v. Burtice et al.*, 24 Ill. 489, the court reconsiders its holding in the Pease case, and adheres to its former ruling.

In *City of Chicago v. Larned et al.*, 34 Ill. 203, the court in sustaining an attack upon a confirmation judgment held, under the Statute of 1848, that the right to levy a special assessment rested upon the constitutional provision of equality and uniformity of burden throughout the field of benefit.

In *Rich et al. v. City of Chicago*, 59 Ill. 286, the court sustained a collateral attack upon a confirmation judgment on the further ground that it appeared from the record of the confirmation proceeding introduced in evidence, that the improvement was not ordered by three-fourths of the aldermen present in council, as required by the charter; and for the further reason that the publisher's certificate to the printed notice of the meeting to make the assessment, did not state, as required by statute, the date of the last paper containing the notice. And further held that the city council, in issuing special assessment warrants and making them the basis for ap-

plication to sell land, transcended its powers because it is a branch of the legislative and not the judicial department of the government, and declined to put the decision upon that ground, as thereby an innumerable number of sales that had been made theretofore would have been invalidated without any corresponding good resulting to the tax payer.

Prior to the Constitution of 1870, it was held that a special assessment that was not spread co-extensive with the field of benefit, was fatally defective.<sup>1</sup> That a public square in a city was within the field of benefit and liable to be assessed.<sup>2</sup> Further, it was held that a confirmation judgment rendered on an application of the city collector of Chicago, in place of an officer of the county who had authority, under section 4, article 9 of the constitution, to make application, was void.<sup>3</sup> And further, it was held that a railroad was not exempt from liability to respond to the levy of an assessment for widening a street, although, by a prior agreement, the company might not be liable to pay for paving.<sup>4</sup>

Again it was held that an assessment that provided for assessing \$125,200 upon real estate to be benefited, when there was no evidence before the city council that there was property that would be benefited to that extent, was void.<sup>5</sup> In holding this ordinance void, the court used this language: "It assumed that there is property which will be specially benefited to the extent of this very large assessment, although the town has taken no measures to ascertain that fact, and arbitrarily directs the imposition of this sum as a tax upon property benefited. \* \* \* The cardinal principle of equation

1—Chicago, City of v. Beer et al., 41 Ill. 306 (Af.).

2—Scammon v. Chicago, City of, 42 Ill. 192 (R. R.).

3—Hills v. Chicago, City of, 60 Ill. 86 (R. R.).

4—Parmelee et al. v. Chicago, City of, 60 Ill. 267 (R. R.).

5—Greeley et al v. People, 60 Ill. 19 (R. R.).

between burdens and benefits upon which it was necessary, under the Constitution of 1848, that all special assessments should be based, was here entirely ignored.”<sup>6</sup>

Again it was held that an assessment and ordinance were void that were based upon the action of two of three members of the board of public works, one of whom by reason of his interest was disqualified to act.<sup>7</sup>

Again, ordinances were held void that conferred upon the board of public works duties that the statute required to be exercised by the common council.<sup>8</sup>

Again it was held when an original assessment had been declared void, that a second assessment to make up its deficiency was also void, and the court said: “If the legislature has prescribed a mode for making a statutory proceeding effectual which is unconstitutional, the courts have no authority to reject that mode and adopt a different one.”<sup>9</sup>

Again it was held that a special tax or special assessment that operated in its levy and collection on all the taxable property in the city, was not a local tax, and a judgment rendered thereon was erroneous.<sup>10</sup>

The Revenue Law of 1885, section 177, provided that delinquent taxes after a certain date should bear interest. It was held that special assessment not being mentioned were not included. *Murphy v. People*, 120 Ill. 234.

#### ORDINANCES—VOID

Under an ordinance based upon an estimate for a street improvement, 61 feet in width, judgment of con-

6—*Greeley et al. v. People*, 60 Ill. 19 (R. R.).

7—*Hunt v. Chicago, City of*, 60 Ill. 183 (R. R.).

8—*Byran v. Chicago, City of*, 60 Ill. 507 (R. R.); *Wright v. Chicago, City of*, 60 Ill. 312 (R. R.); *Foss v. Chicago, City of*, 56 Ill. 354 (R.

R.); *Walker v. Chicago, City of*, 62 Ill. 286 (R. R.); *Chicago, City of v. Habar et al.*, 62 Ill. 283 (A. F.).

9—*Union Bldg. Assoc. v. Chicago, City of*, 61 Ill. 439 (R. R.).

10—*Webster v. People ex rel.*, 98 Ill. 343 (R. R.).

firmation was rendered June 19, 1893. In September, 1893, the city council passed an amended ordinance changing the width of the improvement to 53 feet. It was held that the ordinance was void.<sup>11</sup>

A special tax was levied for the construction of a sidewalk. The width of the walk was described as "not less than or more than" so many feet. It was held that the ordinance was void for lack of a definite and sufficient description.<sup>12</sup>

The Act of 1873 (R. S. 1874, page 744, sec. 3) provided that proceedings to collect assessments should conform to provisions of article 9 of an act to provide for the incorporation of cities and villages (1872).

In 1887 and 1891 several new sections were added to the Act of 1872, and provisions were made for dividing assessments into instalments.

The City of Chicago, while under a special charter, adopted article 9 of the Act of 1872 as the method to be pursued in levying and collecting special assessments.

The town of West Chicago passed an ordinance providing for the payment of a special assessment in instalments. On an application for judgment of sale under the confirmation judgment, it was held, that the ordinance including the judgment of confirmation was void, for the reason that the town of West Chicago had no right to divide a special assessment into instalments. The amended section did not apply to cities and towns that were acting under special charters.<sup>13</sup>

Again, it was held, that an ordinance was void that left the nature, character, and description of the improvement largely to be determined by the department of public works.<sup>14</sup>

11—*Pells et al. v. People ex rel.*, 159 Ill. 580 (R. R.).

12—*Manfield v. People ex rel.*, 164 Ill. 611 (R.).

13—*Culver v. People ex rel.*, 161

Ill. 89 (R. R.); *Andrews v. People ex rel.*, 173 Ill. 123 (R. R.).

14—*Cass v. People ex rel.*, 166 Ill. 126 (R. R.); *People ex rel. v. Hurford et al.*, 167 Ill. 226 (Aff.).

## INDEFINITE DESCRIPTIONS

Where it is impossible to tell what land is assessed, or against what land the judgment of confirmation is entered, the assessment and judgment will be void.<sup>15</sup>

In sustaining an objection to the sale of land under a confirmation judgment, the court observed: "An objection going to the jurisdiction of the court which rendered the judgment confirming the assessment, can be made in the proceeding in which the collector applies for sale against the property. The special assessment proceeding as well as the present one is a proceeding *in rem* against specific property, and no personal judgment can be rendered. \* \* \* As no plat was recorded, as required by statute, there were no lots described against which any taxes or a lien for taxes could attach."<sup>16</sup>

## JURISDICTION

Collateral attack sustained because publisher's certificate attached to the notice of an application for judgment of confirmation said: Published "five times" instead of "five successive days";<sup>17</sup> because the publisher's certificate was dated "February 8, 1892," and certified, that the last publication was on "February 10, 1892";<sup>18</sup> because the notice of an application for confirmation was signed by only two of the three commissioners;<sup>19</sup> because the ordinance was not passed until

15—People ex rel. v. Eggers, 164 Ill. 515 (Af.); Upton v. People ex rel., 176 Ill. 632 (R. R.); Vennum v. People ex rel., 188 Ill. 158 (R. R.); People v. Owens, 231 Ill. 311 (R. R.); People ex rel. v. Clifford, 166 Ill. 165 (Af.); People ex rel. v. Colegrove, 218 Ill. 545 (Af.).

16—People ex rel. v. Clifford, 166 Ill. 165 (Af.); People v. Cook, 188 Ill. 341 (Af.).

17—Evans v. People, 139 Ill. 552 (R. R.).

18—McChesney et al. v. People ex rel., 145 Ill. 614 (R.).

19—McChesney et al. v. People ex rel., 148 Ill. 221 (R. R.); Boynton v. People ex rel., 155 Ill. 66 (R. R.).

after the work was done; <sup>20</sup> because the assessment was divided into ten instalments; <sup>21</sup> because a land owner was not named in the assessment proceeding, had no notice, constructive or actual, and no jurisdictional facts were recited in the confirmation record; <sup>22</sup> because the sewer was not placed on the line stated in the ordinance; <sup>23</sup> because 'the bill of costs for a sidewalk was filed by the city engineer in the office of the city clerk before its completion and not after as required by statute; <sup>24</sup> because the commissioners of highways met on August 7, 1900, and levied a tax, instead of on September 4, 1900, at the town clerk's office as required by statute; <sup>25</sup> because the "cost of grading, materials, laying down and supervision" incident to the construction of a sidewalk was not embodied in the engineer's statement required by statute to be filed with the city clerk; <sup>26</sup> because the local improvement board changed the foundation layer from 6 inches named in the ordinance to 7 inches; <sup>27</sup> because the municipality accepted a different improvement than the one for which the assessment was levied.<sup>28</sup>

A collateral attack was sustained because a notice was not given of a proceeding to assess the cost of drainage repairs, as required by statute (sections 3 and 37, Levee Act, Ses. Laws, pp. 111 and 124, 1885); <sup>29</sup> be-

20—Weld v. People ex rel., 149 Ill. 257 (R.).

21—People ex rel. v. Nelson et al., 156 Ill. 364 (Af.).

22—Payson v. People, 175 Ill. 267 (R. R.).

23—Church et al. v. People ex rel., 174 Ill. 366 (R. R.); Church ex rel. v. People ex rel., 179 Ill. 205 (R. R.).

24—Craig v. People ex rel., 193 Ill. 199 (R. R.); People ex rel. v. Latham, Ex'r, 203 Ill. 9 (Af.).

25—Chicago & N. W. Ry. Co. v. People ex rel., 193 Ill. 594 (R. R.).

26—Biggins Estate v. People ex rel., 193 Ill. 601 (R. R.).

27—Young v. People ex rel., 196 Ill. 603 (R. R.).

28—Gage et al. v. People ex rel., 200 Ill. 432 (R. R.); Eustace et al. v. People ex rel., 213 Ill. 424 (R. R.); Phillips et al. v. People, 218 Ill. 450 (R. R.).

29—Frank et al. v. Rogers, 220 Ill. 206 (R. R.).

cause the classification number of a land owner in a drainage district, who had not joined with others in an appeal, was changed by a jury sitting in review of the action of the commissioners. The statute (sec. 24, Farm Drainage, p. 148, Ses. Laws 1901) required the review of the jury to be confined to parties who had objected to the action of the commissioners and appealed therefrom;<sup>30</sup> because a board of education had not "determined the amount of money required to be raised by taxation" and certified said amount to the city council under their hands and seals;<sup>31</sup> because there was no record evidence of a meeting of the drainage commissioners within the district to levy the assessment for which a judgment of sale was sought;<sup>32</sup> because the land owner, against whose land a judgment was sought, had not been made a party to the assessment proceeding.<sup>33</sup>

A collateral attack, upon a judgment confirming a drainage assessment for benefits to be bestowed upon certain highways, was sustained in a petition for mandamus against the highway commissioners, because there was no recital in the confirmation record of jurisdictional facts and "no notice of any kind is found in the record indicating that any notice was served" upon the commissioners.<sup>34</sup>

A collateral attack upon a condemnation judgment under sections 4, 5, 6, 7, 8, article 9, Ch. 24, R. S. 1874, was sustained in a supplemental proceeding under section 53 of said article 9, because the judgment of condemnation rested upon a verdict that had been ma-

30—Carr v. People ex rel., 224 Ill. 160 (R. R.).

31—People ex rel. v. Welsh, 225 Ill. 364 (Af.).

32—People ex rel. v. Carr et al., 231 Ill. 502 (R. R.); People ex rel. v. Camp, Appellee, 243 Ill. 154

(Af.); People ex rel. v. Schwank et al., Appellee, 237 Ill. 40 (Af.).

33—People ex rel. Appellee v. Dunn, 247 Ill. 410 (R. R.).

34—Spring Creek Drain. Dist. v. Highway Com'rs, Appellant, 238 Ill. 521 (R. R.).



terially changed by the court without the consent of the jury.<sup>35</sup>

A collateral attack upon a condemnation judgment entered under the provisions of section 6, article 9, Ch. 24, R. S. 1874, was sustained because in the condemnation petition one of the land owners was described as "known" and service was attempted to be had upon him by publication, when there was no statutory showing that he was a non-resident.<sup>36</sup>

Collateral attack was sustained because the improvement as finally constructed did not conform substantially to the ordinance authorizing it.<sup>37</sup>

Section 84, Act of 1897, amended in 1903. Ses. Laws, p. 105.

In *Pells et al. v. People, ex rel.*, 159 Ill. 580 on an application of sale of lands reported delinquent, the property owners objected: "That they were assessed for making a larger improvement than was contracted for by the city and for a larger improvement than was actually constructed." It was held error to overrule this objection for the reason that the judgment of confirmation "only concludes the land owner from questioning any of the proceedings had prior to the confirmation."

This position taken by the court, allowing property owners to show that the municipality has changed the locality or accepted a different improvement than the one for which an assessment was levied, is retaken in *Young v. People, ex rel.*, 196 Ill. 603; *Gage v. People*, 200 Ill. 432, and *Eustace v. People*, 213 Ill. 424.

35—*Ayer et al. v. Chicago, City of*, 149 Ill. 262 (R. R.).

36—*Dickey et al. v. Chicago, City of*, 152 Ill. 468 (R. R.).

37—*Young v. People ex rel.*, 196 Ill. 603 (R. R.); *Eustace et al. v. People ex rel.*, 213 Ill. 424 (R. R.).

Collateral attack was sustained because the valuation that supported the tax levy included property legally liable to assessment in the State of Iowa and not in the State of Illinois. *Keokuk Bridge Co. v. People ex rel.*, 161 Ill. 132 (R. R.).

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## CHAPTER XX

### SPECIAL ASSESSMENTS

#### COLLATERAL ATTACK UNSUCCESSFUL

Application for judgment of sale against lands reported delinquent to the county collector.

The general principle is: If the court on application for judgment confirming a special assessment has jurisdiction of the parties and the subject-matter as provided by statute, then the judgment confirming can not be inquired into on the application for sale.<sup>1</sup>

#### JURISDICTION SCOPE AND MEANING

When a confirmation record is viewed by the court collaterally rather than directly, the term "jurisdiction" has a limited significance to which attention needs to be paid. In *People ex rel. v. Talmadge*, 194 Ill. 67, it is said: "Jurisdiction is authority to hear and decide a cause, and it does not depend upon the correctness of the decision." In defining what is meant by this term, when an ordinance was attacked collaterally, the court uses this language: "If an ordinance on which an application for a judgment of confirmation is based con-

1—*Blake v. The People ex rel.*, 109 Ill. 504 (Af.); *Blount v. The People ex rel.*, 188 Ill. 538 (Af.); *Clark v. People ex rel.*, 146 Ill. 348 (Af.); *Conlin v. People ex rel.*, 190 Ill. 400 (Af.); *Gross v. People ex rel.*, 172 Ill. 571 (Af.); *Leitch v. People ex rel.*, 183 Ill. 569 (Af.);

*People ex rel. v. Brislin*, 80 Ill. 423 (R. R.); *People ex rel. v. Lingle, Trustee*, 165 Ill. 65 (R. R.); *Sternberg et al. v. People ex rel.*, 164 Ill. 478 (Af.); *Walker et al. v. People ex rel.*, 169 Ill. 473 (Af.); *Johnson et al. v. People ex rel.*, 189 Ill. 83 (Af.).

tains sufficient allegations descriptive of the proposed improvement to challenge the attention of the court, jurisdiction attaches in the court to judicially determine, etc." *Perry v. People ex rel.*, 206 Ill. 334 (Af.).<sup>2</sup>

A collateral attack by bill in equity (*Sumner v. Milford, Village of, et al.*, 214 Ill. 388) was made upon a petition of property owners, wherein it was claimed: "That the court acquired no jurisdiction because the petition presented to the board of local improvements had lost its vitality by prior use made of it." In sustaining the circuit court's dismissal of the bill, the following language is used:

"The argument in support of the bills is founded mainly on the use of the words 'jurisdiction' and 'void' in various opinions of the court when applied to municipalities, boards of local improvements or courts, but counsel do not refer to any case where the question of the jurisdiction of a county court was involved, and where it was held that there was no jurisdiction, because of the want of a petition for the improvement or the invalidity of such petition. Words often have different meanings in different situations, and some times they are used with indefinite or indeterminate meaning. The Supreme Court of the United States, in the case of *Watson v. Jones*, 13 Wall. 732 said: 'There is, perhaps, no word in legal terminology so frequently used as this word 'jurisdiction,' so capable of

2—*Perry v. People ex rel.*, 206 Ill. 334 (Af.).

In the *Sumner* case the confirmation judgment was successfully assailed in a direct proceeding in *Venum v. Milford, Village of*, 202 Ill. 423, and unsuccessfully attacked in *Goldstein et al. v. Milford, Village of*, 214 Ill. 528, and *Harman et al. v. People ex rel.* 214 Ill. 454.

For an instance where a confirma-

tion judgment was successfully assailed directly for lack of jurisdiction, see *Casey, Appellee v. Cincinnati, Hamilton and Dayton Railway Co.*, 263 Ill. 352.

For the distinction between a "want of power" and an "erroneous exercise of power," see *Miller et al., Appellees v. Rowan*, 251 Ill. 344 (Af.).

use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application." It has been used as applying to the authority or mode of procedure of boards of local improvements, to the right or power of the legislative body of the municipality to act upon a certain subject or to pass an ordinance, and also to the legal right or power of a court to hear and determine the matter in controversy: The word "void" is also used in varied meanings and applied indifferently to a thing that has no legal force or effect and is an absolute nullity, and to that which, by reason of some inherent vice or defect may be adjudged void by a court when the question is presented." See note under 2.

Here the record assailed showed that the county court had jurisdiction in the class of cases to which the particular case belonged and whether the petition was sufficient to awaken its action was a question, which, when decided by the county court, could only be reviewed in a direct proceeding.

In determining whether a writ of injunction had been violated the supreme court (*O'Brien v. People ex rel.*, 216 Ill. 354) defines "jurisdiction" as "the power to hear and determine the subject matter in controversy between the parties to a suit. If the law confers the power to render judgment or decree, then the court has jurisdiction. \* \* \* Jurisdiction of the particular matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to decide, whether the pleading is good or bad."



Following the principle well established in reference to county court and chancery records (*Barnett v. Wolf*, 70 Ill. 76, and *Reedy et al. v. Camfield et al.*, 159 Ill. 254) this want of jurisdiction must appear from the record itself and not from matter *dehors*.<sup>3</sup>

## COLLECTION OF SPECIAL ASSESSMENTS

Section 39, article 9, Ch. 24, R. S. 1874; section 44 *idem*, and section 191, Ch. 120, R. S. 1874; section 66 of the Act of 1897.

Enforcing the collection of special assessments through the sale by the county collector of the land specially benefited.

The machinery provided by the Act of 1897 (sections 61, 63, 64, 65, 66, 67) for enforcing the collection of special assessments through the sale of the land specially benefited, except in a few minor details, does not differ from what was provided in article 9, Chapter 24, R. S. 1874 (sections 35 to 40).

Under both statutes, the clerk of the court in which the confirmation judgment is rendered, is required to certify the "assessment roll and judgment" to the "clerk of such city or village" (section 35, article 9) or "the officer of such city, village or town authorized to collect such special assessment" (section 61, Act of 1897). The city or village clerk, under the former statute issued a warrant for the collection of the special assessment; the clerk of the court, under the latter statute issues the warrant; the person receiving the warrant is required to give notice by publication of his reception of the warrant and make demand of payment upon all

3—*Dickey, Jr., Trustee v. People ex rel.*, 160 Ill. 633 (Af.); *Casey v. People ex rel.*, 159 Ill. 267 (Af.); *Thompson v. People ex rel.*, 207 Ill. 334 (R. R.).

Louisville, New Albany and Chi-

cago Railway Co. v. Carson Ex'rs et al., 169 Ill. 247 (Af.); *Markley v. People ex rel.*, 171 Ill. 260 (R. R.); *Sawyer v. Woodbury*, 7 Gray 499; *Black River Savings Bank v. Edwards*, 10 Gray 387.

persons resident within the neighborhood, whose names appear upon the assessment roll, or the occupants of the property assessed" (section 64, Act 1897).

Section 39, of article 9, Ch. 24, R. S. 1874, provided that the "collector of special assessments" should report to the county collector "all the land, town lots and real property" on which he was unable to collect the amount that had been assessed thereon; said report to be accompanied with his oath that he had performed all the duties thereabout enjoined upon him by the statute.

The final provision in this section is: "Said report, when so made, shall be *prima facie* evidence that all the forms and requirements of the law in relation to making said return have been complied with, and that the special assessments mentioned in said report are due and unpaid. And, upon the application for judgment upon such assessment, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof."

With the words, "or special taxes, or the matured instalments thereof, and the interest thereon, and the interest accrued on instalments not yet matured," interpolated between the words "special assessment" and "mentioned" in the above quotation from the statute, there is added in section 66 of the Act of 1897:

(a) "And no errors in the proceeding to confirm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application herein provided for. (b) When such application is made for judgment of sale upon an instalment only, of an assessment payable by instalments, all questions affecting the jurisdiction of the court to enter the judgment of confirmation shall be raised and determined on the first of such applications. (c) On application for judgment of sale on any subsequent instalment, no defense, except as to the *legality of the pending*

*proceeding*, the amount to be paid, or actual payment, shall be made or heard. (d) And the voluntary payment by the owner or his agent, of any instalment, levied on any lot block, tract or parcel of land, shall be deemed and held in law to be an assent to the confirmation of the assessment roll, and be held to release and waive any and all right of such owner to enter objection to the application for judgment of sale and order of sale. (e) The judgment of sale on any instalment shall include all interest accrued on said instalment up to the date of said judgment of sale and also the annual interest due as returned delinquent by the municipal collector on any instalment or instalments not matured; (f) and all judgments of sale for a matured instalment shall bear interest on the amount of the principal of said matured instalment to the date of payment of sale." Ses. Laws 1901, p. 111.

With the exception of the reference to the recovery of interest on instalments, these new provisions in the Act of 1897 amount to little more than statutory recognition of the principles of estoppel and *res adjudicata*, that would apply though no mention was made thereof. The recovery of one instalment by judgment of sale of the land would doubtless be analogous to the recovery of a judgment for the annual interest upon a promissory note, or instalments of rent upon a lease, where a recovery in the first suit determines the right to recovery in the second. See note under 3.

#### ORGANIZATION OF DRAINAGE DISTRICT

The attack failed because the attempt was to inquire into the legality of the organization of a drainage district. This can only be done through the issuance of a writ of *quo warranto*.<sup>4</sup>

<sup>4</sup>—Osborn v. People ex rel., 103 Ill. 224 (Af.); Blake v. The People ex rel., 109 Ill. 504 (Af.); People ex rel. v. Dyer Co., Col., 205 Ill. 575 (R. R.).

## ASSESSMENTS SAVED BY FINDINGS IN THE RECORD

The attack failed because, though the confirmation record did not contain the notice to property owners, there was a recital that "due notice as required by law had been given."<sup>5</sup>

The attack failed because, though, there was no finding by the commissioners appointed to spread the assessment, there was a finding in the ordinance by the "board of trustees" of the town that "there is real estate within said town which will be benefited by said improvement to the amount hereby ordered to be specially assessed."<sup>6</sup>

It is a fundamental principle that it shall appear from the record assailed that the assessment does not exceed the benefits conferred.<sup>7</sup>

The collateral attack failed because the property, though devoted to a public or a charitable or a religious use, was specially benefited.<sup>8</sup>

The failure of the property owner to receive notice of an application for judgment of confirmation upon the assessment roll, can not be availed of if the confirmation record shows that the statutory directions in reference to sending notices were complied with.<sup>9</sup>

## RECITALS IN THE CONFIRMATION RECORD—EFFECT OF

In *I. C. R. Co. v. People*, 189 Ill. 119 (Af.), it was contended that the county court lacked jurisdiction to enter a judgment of confirmation "because the notice of the

5—*Prout v. People ex rel.*, 83 Ill. 154 (Af.); *People ex rel. v. Soucy et al.*, 261 Ill. 108 (R. R.).

6—*Crawford et al. v. People ex rel.*, 82 Ill. 557 (Af.).

7—*Crawford et al. v. People ex rel.*, 82 Ill. 557 (Af.).

8—*Ottawa, City of, v. Trustees of Free Church et al.*, 20 Ill. 423 (R. R.).

9—*Clark v. People ex rel.*, 146 Ill. 348 (Af.); *Schertz v. People*, 105 Ill. 27 (Af.).

final hearing of the petition was published only *fourteen* days, while the statute requires fifteen." There was, however, in the confirmation judgment a recital as follows: "That L. S. Ham, special assessor, has in all things with reference to giving notice complied with the law."

It was held that the defective certificate was not sufficient to overcome this recital.

This case should be carefully distinguished from the McChesney case, 145 Ill. 614, the McChesney case, 148 Ill. 221, and the Boynton case, 155 Ill. 66. In these cases the confirmation record was successfully assailed collaterally because there was no similar recital that cured the defective service upon the property owner.

#### SECTION 84, ACT OF 1897

To meet the position taken by the supreme court sustaining on collateral attack an objection that the improvement did not conform to the ordinance or that a different one had been built than the one provided for in the ordinance, the legislature inserted section 84 in the Act of 1897 which was materially amended in 1903.

Under this section the improvement board, within 30 days after the completion and acceptance of the work is required to certify to the court, in which judgment of confirmation was entered its cost, the sum of money necessary to pay interest on bonds and vouchers, and any excess of funds remaining to be divided pro rata among the land owners interested.

This section further provides that:

"In every assessment proceeding in which the assessment shall be divided into instalments, it shall also be the duty of the board of local improvements to state in said certificate whether or not the said improvement conforms substantially to the requirements of the original ordinance for the construction of the improvement

and to make an application to said court to consider and determine whether or not the facts stated in said certificate are true."

The statute further provides that 15 days' notice shall be given of the hearing at the time and place fixed by the court. The statute further provides that the certificate shall be *prima facie* evidence that the matters therein stated are true, and upon a summary hearing under objections filed, the court "shall enter an order according to the fact," which order shall be conclusive upon the parties and no "appeal therefrom, or writ of error thereto, shall be allowed to review or reverse the same."

In *People ex rel. v. Cohen et al.*, 219 Ill. 200, the objection was made: That the improvement as constructed is other and different from the one described in the ordinance which is the basis of the application." On the hearing below the certificate of the board of local improvements was introduced which certified that the "improvement had been complete in substantial compliance with the requirements of the ordinance, etc." It was held that the question was not open to further inquiry. Property owners were concluded thereby and that the statute was not open to the objection "that it deprived the property owners of their property without due process of law."

#### DRAINAGE CASES

##### ORGANIZATION OF DISTRICT ATTACKED

Application for judgment against land reported delinquent for non-payment of a special assessment.

Attack made upon the organization of the drainage district. Reply of the court: "There is an absolute want of power in the court to hear evidence in a collateral proceeding like this, for the purpose of determining whether a corporation is legally organized. This can

only be done by *quo warranto*, which is a direct proceeding to determine its validity." After giving various reasons for this holding, the conclusion is announced that "the highest considerations of public policy forbid the inquiry whether a corporation is legally organized in any but a direct proceeding."<sup>10</sup>

To defeat an application for judgment for the amount of a special assessment levied under the Farm Drainage Act (Ses. Laws, 1879, p. 142), its constitutionality is attacked.

First, for the reason that the special assessment was levied by the "county commissioners," who had been created "Drainage Commissioners" of the County of St. Clair by section 43 of the act (p. 153). It was contended in support of the objection that this provision of the act amounted to the appointment to the office of drainage commissioner men who had not been elected by the land owners in the district over which the special assessments had been spread, and so was within the inhibition of the constitution that declares (sec. 10, art. 5) "no such officer shall be appointed or elected by the general assembly." In disposing of this objection the court held that no new office or appointment to office had been made, but only new duties were imposed upon officers who had been elected by the people.

Second. It was contended that the drainage commissioners are an illegal corporation because the people of the drainage district never gave their consent to their appointment or election. To this the court replies: "This is based upon the decisions in *The People ex rel. v. Mayor*, 51 Ill. 17, and *Harward v. St. Clair Drainage Co.*, *Idem* 130, and kindred cases, where the decision, or at least, intimation of the court was, that a law creating a municipal corporation with power to incur debts which

10—*Osborn v. People ex rel.*, 103 Ill. 224 (Af.); *Blake v. People ex rel.* 109 Ill. 504 (Af.).

would have to be paid by general taxation, to be obligatory must first receive the sanction of a majority of the legal voters of the district. No express constitutional provision required this, but the conclusion was deduced from the restriction imposed upon the general assembly by section 37, article 3 of the Constitution of 1848, which prohibited the state from creating a debt exceeding \$50,000 without the consent of the people, manifested by a vote at a general election. The vote of the people of the district was required because any debt created would fall upon the taxable property of the entire district, and might be such as would bankrupt the tax payer." \* \* \* "The reasoning controlling in *The People ex rel. v. Mayor, Harward v. St. Clair Drainage Co.*, and other like cases, can have no application to the statute now before us, for the only debt it authorizes to be created must be paid by a special assessment upon the property specially benefited by the proposed improvement. Such an assessment is not a personal charge, but one, only, against the property specially assessed. The property specially assessed may belong to a very few of the voters of the district. The theory of the special assessment is, certain real estate will be benefited by the proposed improvement more than it will cost to make it, and it, therefore, must bear the burden. It is the ownership in that real estate,—not the public, merely as such,—that may be injuriously affected by that special assessment."

Under the amendment to the constitution adopted at the election in 1878 the legislature could provide for drainage organizations with power to levy special assessments upon property found to be specially benefited.

In overruling the third objection it was held, that the county surveyor, county treasurer and sheriff, who by section 46 of the act were created a board of appeals, were not empowered to "exercise judicial power within



the meaning of that word as used in the third article of the constitution."

A fourth objection was: That under the "20th section of the act, the drainage commissioners are permitted to appeal to the county court upon any and every ground which may show that the judgment of the board of appeals is illegal and erroneous, but *the land owner* can appeal only upon the ground that his assessment is greater in amount than benefits accruing to his land."

The court in disposing of this objection observes: That the board of appeals is limited to the inquiry as to the amount of benefit that will accrue to each piece of land; that both the commissioners and the land owners are interested in this question. And whether "the appeal shall be by one party or the other, the questions before the county court, on appeal, must substantially be the same."

The last objection was: That the Levee Act and the Farm Drainage Act were passed on the same day (May 29, 1879), were upon the same subject and provided for different systems of drainage corporations, were special legislation and condemned by the constitution. To which the court replies: "Concede they are local or special legislation, what clause of the constitution prohibits their enactment? Article 9 of the constitution, entitled "corporations" clearly relates to private corporations, and not to local municipal corporations. This is so apparent upon the face of the constitution that we deem the mere statement of itself, sufficient. The direct prohibition of special or local legislation is alone contained in section 22, article 4. "Drainage is not one of the subjects enumerated in that section." <sup>11</sup>

11—Owners of Lands v. People  
ex rel., 113 Ill. 296 (Af.).

Sec. 31, Art. 4, of the constitution  
limits the power to construct drains,  
ditches and levies for agricultural,

sanitary or mining purposes to prop-  
erty benefited. The fact that a ma-  
jority of land owners petition for  
the organization of a district, is  
equivalent to submitting the ques-

## RECORD ENLARGING DISTRICT ATTACKED

The boundaries of a drainage district lying partly in three towns was enlarged by a proceeding had before the drainage commissioners under section 42 (Farm Drainage Act, Ses. Laws, p. 91, 1885). Objection was made to the application for judgment for special assessment, that the proceeding should have been had before the county court, because the original organization of the district was before the county court. It was further objected, that the land owners were deprived of the right of appeal from the decree of classification made by the commissioners and filed with the clerk, because it was thereafter mislaid and could not be found for inspection.

The court found no "warrant in the statute, either express or implied \* \* \* that a proceeding to enlarge a drainage district of any class should be conducted in the county court." It was further held: That the decision of the commissioners enlarging the district would be binding, though they were to a limited extent an interested tribunal. To the point that the land owners were prevented from taking an appeal, the court replies: "This objection clearly does not affect the justice or the validity of the assessment, and consequently can not prevail in an application of this kind. The appellants were bound, at their peril, to take notice of all orders made by the commissioners in the proceeding. The statute required them to adjourn from day to day, until all objections to the classification of lands were heard and disposed of. After the first notice, the statute declares that "all persons shall take cognizance of all adjournments, without further notice." <sup>12</sup>

tion of organization to a popular vote. *Herschbach et al., Appellant v. Kaskaskia Island Sanitary and Levee District et al.*, 265 Ill. 388

(R. R.), citing owners of lands, *supra*.

12—*Scott, Ex'r v. People ex rel.*, 120 Ill. 129 (Af.).

CONFIRMATION RECORD DID NOT SHOW THAT ASSAILANTS WERE  
NON-RESIDENTS

Several objections were made by a railway company that involved the question whether it had received the statutory notice of the organization of a drainage district under the Levee Act. Sections 19 and 3 of the act (Ses. Laws 1885, p. 108), provided that residents of the district should be notified by posting notices—one at the courthouse door and ten in different places in the district, and by publication in a newspaper and that non-residents, whose names and place of residence were shown by affidavit should be notified by mail. As there was nothing in the record to show that the company was a non-resident, it was held, that notification by mail was not necessary to give jurisdiction. It was further held, that the company, having consented that a sum allowed for land taken could be applied in reduction of a special assessment, was precluded from making the objection that it had not been paid in money; and that the question of payment for the land could not be litigated in an application for judgment against the land.<sup>13</sup>

The introduction of several judgments against drainage district without any evidence that the "judgments were in any way connected with the taxes sought to be collected in this proceeding" is not sufficient to overcome the *prima facie* case made by the collector.

Where the objections are the same several land owners may join if no confusion or embarrassment is likely to ensue therefrom.<sup>14</sup>

## ORGANIZATION CANNOT BE TESTED

Objections that call in question the organization of the drainage district can not be interposed to defeat a

13—Elgin, Joliet & Eastern Ry. Co. v. Hohenshell Co., Treasurer, 193 Ill. 159 (Af.).

14—People ex rel. v. Keener et al., 194 Ill. 16 (R. R.).

judgment against the land for a delinquent special assessment.<sup>15</sup>

#### CLASSIFICATION OF LANDS

##### NO NOTICE OF ASSESSMENTS

An objection was made that the commissioners had not given any notice of the filing of the assessment roll and that the land owner did not learn of it until it was too late to take an appeal. It was held under the Act of 1885 (Ses. Laws 1885, p. 77), the commissioners were not required to give any notice, but that property owners were bound to take notice of every step.

In illustration of this point the court says:

“The commissioners, as a first step, make a classification of the lands; the property owners are then brought before them by notice,—residents by personal service, and non-residents by publication; and the succeeding steps to be taken, both by the property owners and the commissioners, follow in regular progression, and without unnecessary delay. And for the same reason that a party over whose person the court has acquired jurisdiction is required to take notice of the different steps taken in his cause, the property owner in a drainage district who has been notified of the classification of the lands, must also be required to take notice of each succeeding step taken by the commissioners to effect the object for which the district has been organized.”<sup>16</sup>

Moore, Ex’x v. The People ex rel., etc., 106 Ill. 376 (Af.):

County collector making application for judgment against certain lands for the non-payment of two special assessments against 420 acres in a contiguous tract. The

15—People ex rel. v. Dyer Co.,  
Col., 205 Ill. 575 (R. R.).

16—People ex rel. v. Chapman,  
127 Ill. 387 (R. R.).

commissioners assess a gross sum of \$600 against the entire tract.

Point made: Entire assessment void because law required the lands to be divided and separate assessment made upon each tract.

Following *Spellman v. Curtenius*, 12 Ill. 409, the court says that section fourteen (Ses. Laws 1879, p. 146) of the Drainage Act does not require "that such listing shall be upon the smallest legal subdivision of land, but that two or more disconnected tracts shall not be listed and valued together.

2nd answer: Section 32 (Ses. Laws 1879, p. 151) of the Drainage Act provides that where the assessment hereinbefore made shall be inadequate to complete the work proposed, each tract of land shall be assessed such proportion of the additional cost as its original assessment bore to the total original assessment. \* \* \* It is claimed by appellant that the second assessment is void for the reason the record \* \* \* fails to show the object of this assessment \* \* \* it is true that the commissioners had no authority to make the second assessment unless the amount first assessed was inadequate to complete the work, or unless it was necessary to raise money to repair, \* \* \* but the statute does not require that the commissioners should place upon the record the reason or object which led to the second assessment, and in the absence of such a requirement by the act, the action of the commissioners cannot be held void.

Assessment void for the reason that the right of way and franchise of the railway company which runs through the district and the public highways were not assessed, while they were benefited.

Court cites: *Elliott v. Chicago*, 48 Ill. 293, and say: "The judgment of the commissioners in regard to the assessment of property cannot, where they have acted honestly and fairly, be overthrown by the mere opinions

of witnesses as to what property has been benefited. This objection should have been made at the meeting of the commissioners to confirm the assessment. If the commissioners had denied the relief, the statute gave an appeal.

Act, under which the assessment was levied, claimed to be unconstitutional, because in violation of sections 1-9 and 10 of article 9 of the constitution.

The act was sustained because passed under the amendment of section 31, article 4, of the constitution (Laws of 1877, p. 219), which became a part of the constitution by vote of the people.

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Kimball v. People ex rel., 160 Ill. 653 (Af.).  
Kirchman v. People ex rel., See Record Proper, 159 Ill. 265 (Af.).

\* Overruled in *McChesney v. People ex rel.*, 171 Ill. 267 (R. R.).



- Kunst v. People ex rel., 173 Ill. 79 (Af.).  
Larson et al. v. People ex rel., 170 Ill. 93 (Af.).  
Law v. People ex rel., 80 Ill. 268 (Af.).  
Lehmer v. People ex rel., 80 Ill. 601 (Af.).  
Leitch v. People ex rel., 183 Ill. 569 (Af.).  
LeMoyne et al. v. West Chicago Park Comrs., 116 Ill. 41 (Af.).  
Lindecker v. People ex rel., 98 Ill. 21 (Af.).  
Martin et al. v. People ex rel., 87 Ill. 524 (Af.).  
McAuley v. Chicago, City of, 22 Ill. 563 (Af.).  
McCauley v. People ex rel., 87 Ill. 122 (Af.).  
McChesney et al. v. People ex rel., 99 Ill. 216 (Af.).  
McChesney v. People ex rel., 178 Ill. 542 (Af.).  
McChesney v. People, 171 Ill. 267 (R. R.).  
McCullough, Auditor v. Board of Review of Peoria Co., 183 Ill. 373 (R.).  
McManus et al. v. People ex rel., 183 Ill. 391 (Af.).  
Meadowcroft v. People ex rel., 154 Ill. 416 (Af.).  
Moore Exr. v. People ex rel., 106 Ill. 376 (Af.).  
McDonald et al. v. People ex rel., 206-624 (Af.). (Follows Downey, 205-230.)  
Nicholes v. People ex rel., 165 Ill. 502 (Af.).  
Noonan v. People ex rel., 221 Ill. 567 (Af.).  
O'Neil v. People ex rel., 166 Ill. 561 (Af.).  
Osborn v. People ex rel., See Drainage Cases, 103 Ill. 224 (Af.).  
Ottawa, City of v. Trustees of Free Church et al., 20 Ill. 423 (R. R.).  
Owners of Land v. People ex rel., 113 Ill. 296 (Af.).  
Peck v. People ex rel., 153 Ill. 454 (Af.).  
People ex rel. v. Brislin, 80 Ill. 423 (R. R.).  
People ex rel. v. Brown, 218 Ill. 375 (R. R.).  
People ex rel. v. Chapman, 127 Ill. 387 (R. R.).  
People ex rel. v. Chapman, 128 Ill. 496 (R. R.).  
People ex rel. v. Chicago & A. R. R. Co., 96 Ill. 369.  
People ex rel. v. Chicago, Bur. & Q. R. R. Co., 189 Ill. 397 (R. R.).

- People ex rel. v. Clayton et al., 115 Ill. 150 (R. R.).  
People ex rel. v. Cohen et al., 219 Ill. 200 (R. R.).  
People ex rel. v. Colvin, 165 Ill. 67 (R. R.).  
People ex rel. v. Cooper et al., 83 Ill. 585 (Af.).  
People ex rel. v. Dyer Co. Col., Drainage, 205 Ill. 575 (R. R.).  
People ex rel. v. Fuller, 204 Ill. 290 (R. R.).  
People v. Funk County Collector, 194 Ill. 16 (Af.).  
People ex rel. v. Gage et al., 83 Ill. 486 (R. R.).  
People v. Harper et al., 244 Ill. 121 (Af.).  
People ex rel. v. Green et al., 158 Ill. 594 (R. R.).  
People ex rel. v. Ill. Cent. R. R. Co., 213 Ill. 367 (R. R.).  
People ex rel. v. Hulin et al., 237 Ill. 122 (Af.). (Drainage.)  
People v. Jones, 137 Ill. 35 (R. R.).  
People ex rel. v. Judson et al., Appellant, 233 Ill. 280 (Af.).  
People ex rel. v. Keener et al., 194 Ill. 16 (R. R.).  
People ex rel. v. Knopf, 171 Ill. 191. (Mandamus.)  
People ex rel. v. Lingle, Trustee, 165 Ill. 65 (R. R.).  
People ex rel. v. Lyon et al., 218 Ill. 577 (R.).  
People ex rel. v. Markley, 166 Ill. 48 (R. R.).  
People ex rel. v. McMahon, 224 Ill. 284 (R. R.).  
People ex rel. v. McWethy, 165 Ill. 222 (R. R.).  
People ex rel. v. Oden Coal Co., 238 Ill. 279 (Af.).  
People ex rel. v. Owens, Appellant, 231 Ill. 311 (R. R.).  
People ex rel. v. Pederson et al., 220 Ill. 554 (R. R.).  
People ex rel. v. Pierce et al., 90 Ill. 85 (R. R.).  
People ex rel. v. Prust et al., 219 Ill. 116 (R. R.).  
People ex rel. v. Ricker, 159 Ill. 496 (Af.).  
People ex rel. v. Ryan, 156 Ill. 620 (R. R.).  
People ex rel. v. Ryan, 225 Ill. 359 (R. R.).  
People ex rel. v. Second Ward Savings Bank, 224 Ill. 191 (R. R.).  
People ex rel. v. Sherman et al., 83 Ill. 165 (R. R.).  
People ex rel. v. Stahl, 101 Ill. 346 (R. R.).  
People ex rel. v. Smith, 94 Ill. 226 (R. R.).

- People ex rel. v. Talmadge, 194 Ill. 67 (R. R.).  
People ex rel. v. Whidden et al., 191 Ill. 374 (R. R.).  
People ex rel. v. Wiemers et al., 225 Ill. 17 (R. R.).  
People ex rel. v. Yancey, 167 Ill. 255 (R. R.).  
Perisho v. People ex rel., 185 Ill. 334 (Af.).  
Perry v. People ex rel., 155 Ill. 307 (Af.).  
Perry v. People ex rel., 206 Ill. 334 (Af.).  
Pfeiffer et al. v. People ex rel., 170 Ill. 347 (Af.).  
Pierson v. People ex rel., 204 Ill. 456 (Af.).  
Pike et al. v. People, 84 Ill. 80 (Af.).  
Pipher v. People ex rel., 183 Ill. 436 (Af.).  
Potwin v. Johnson, Collector, 108 Ill. 70 (Af.).  
Potwin v. Johnson, Collector, 166 Ill. 532 (R. R.).  
Prout v. People ex rel., 83 Ill. 154 (Af.).  
People ex rel. v. Soucy et al. (Drainage. Land owner  
estopped to attack assessment), 261 Ill. 108 (R. R.).  
Rasmussen v. People ex rel., 155 Ill. 70 (Af.).  
Riebling v. People, 145 Ill. 120 (Af.). (See Drain-  
age Cases.)  
Ronan v. People ex rel., 193 Ill. 631 (Af.).  
Rue et al. v. Chicago, City of, 66 Ill. 256 (Af.).  
Schertz v. People, 105 Ill. 27 (Af.).  
Scott Exr. v. People ex rel., 120 Ill. 129 (Af.). (See  
Drainage Cases.)  
Scott Exr. v. People ex rel., 142 Ill. 291 (Af.).  
Shepard v. People ex rel., 200 Ill. 508 (Af.).  
Stack, Trustee v. People ex rel., 217 Ill. 220 (Af.).  
(Drainage, Section 217-220.)  
Sternberg et al. v. People ex rel., 164 Ill. 478 (Af.).  
Smith et al. v. People ex rel., 87 Ill. 74 (Af.).  
Thompson v. The People, 207 Ill. 334 (R. R.).  
Tucker v. People, 156 Ill. 108 (Af.).  
University of Chicago v. People, 118 Ill. 565 (Af.).  
Vandersyde v. People, 195 Ill. 200 (Af.).  
Wagg et al. v. People ex rel., 218 Ill. 337 (Af.).  
Walker v. People ex rel., 166 Ill. 96 (Af.).  
Walker et al. v. People ex rel., 169 Ill. 473 (Af.).

- Walker v. People, 170 Ill. 410 (Af.).  
Walker v. People ex rel., 202 Ill. 34 (Af.).  
Weckler v. Chicago, City of, 61 Ill. 142 (R. R.).  
West Chicago St. R. R. Co. v. People ex rel., 155 Ill.  
299 (Af.).  
West Chicago St. R. R. Co. v. People ex rel., 156 Ill.  
18 (Af.).  
Wheeler v. People ex rel., 153 Ill. 480 (Af.).  
White v. People ex rel., 94 Ill. 604 (Af.).  
Wiemers et al. v. People ex rel., 225 Ill. 82 (Af.).  
Wisner v. People ex rel., 156 Ill. 180 (Af.).  
Wright v. Chicago, City of, 48 Ill. 285 (Af.).  
Wells et al. v. People, Alien Labor and Competitive  
Bidding, 201 Ill. 435 (Af.).  
Young v. People ex rel., 171 Ill. 299 (Af.).  
Zeigler et al. v. People, 156 Ill. 133 (Af.).  
Zeigler v. People, 164 Ill. 531 (Af.).

## CHAPTER XXI

### FORMS

The following forms in special assessment proceedings prepared for the use of the National Paving Brick Manufacturing Association of Cleveland, Ohio, by the late A. H. Baer, a member of the bar of St. Clair County, Illinois, are here published by the permission of said Association.

#### FORM NO. 1

##### PETITION OF ABUTTING PROPERTY OWNERS FOR PAVING OF ROADWAY

To the Board of Local Improvements of the City of .....,  
Ill.

GENTLEMEN:—

We, the undersigned, being owners of property abutting on  
..... Street, in the City of  
....., Illinois, from .....  
to ..... do hereby petition your Honorable  
Body to improve the roadway of said ..... Street,  
for the distance and between the points aforesaid, by *grading, curbing*  
and *paving* the same with brick, the cost of said improvement to be met  
by special assessment (or special taxation):

Name.	Number of Front Feet
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

NOTE.—Not required under Section 4 of Local Improvement Act of 1897, as amended.

## FORM NO. 2

**RESOLUTION OF BOARD OF DIRECTORS OF PRIVATE  
CORPORATION AUTHORIZING SIGNING OF PETITION  
FOR PAVING OF ROADWAY**

*Be it Resolved*, That ....., a Corporation, being the owner of property abutting on..... Street, in the City of....., Illinois, hereby authorizes ....., as its agent and attorney in fact, for it, in its behalf and its name, to sign a petition for the improvement of said .....Street, by *grading, curbing and paving* the roadway of the same with brick, the cost and expense of said improvement to be met by special.....

STATE OF ILLINOIS,  
County of ..... } ss.

I, ....., being Secretary of the....., a Corporation, do hereby certify that the foregoing resolution was duly and properly passed by the Board of Directors of the said.....at a meeting of said Board of Directors, duly and properly called and convened.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the said.....Company, this..... day of ....., 19....

....., Secretary.

(Corporate Seal.)

## FORM NO. 3

**POWER OF ATTORNEY AUTHORIZING AGENT TO SIGN PETITION  
FOR PAVING**

I, ....., being owner of property fronting on..... Street, in the City of....., Illinois, do hereby authorize....., for me, in my behalf and name, to sign a petition for the improvement of said .....Street, by *grading, curbing and paving* the roadway thereof with brick, the cost and expense of said improvement to be met by special assessment (or taxation).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this.....day of ....., 19....

.....(Seal)

FORM NO. 4

POWER TO ATTORNEY AUTHORIZING AGENT TO SIGN PETITION  
FOR CONSTRUCTION OF SEWER

I, ....., being the owner of property front-  
ing on.....Street, in the City of.....  
....., Illinois, do hereby authorize.....  
for me, in my behalf and in my name, to sign a petition for the im-  
provement of said.....Street, by constructing  
therein a sewer, with man-holes, catch-basins, necessary connections and  
appurtenances, the cost and expenses of said improvement to be met by  
special assessment (or special taxation).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this  
.....day of ....., 19....

.....(Seal.)

FORM NO. 5

ORDINANCE DESIGNATING MEMBERS OF CITY COUNCIL AS  
MEMBERS OF BOARD OF LOCAL IMPROVEMENTS

An Ordinance Designating.....Members of the City  
Council of the City of....., Illinois, Who Shall, With  
the Mayor of Said City, Constitute the Board of Local Improvements of  
said City.

*Be it Ordained by the City Council of the City of.....,  
Illinois:*

SECTION 1. That .....and..... members  
of the City Council of this City, be and they are hereby designated and  
appointed members of the Board of Local Improvements of the City of  
..... Illinois, and that said.....  
with the Mayor of this City, constitute the Board of Local Improve-  
ments of this City.

SEC. 2. This ordinance shall be in full force and effect from and  
after its passage and approval.

## FORM NO. 6

## ORDINANCE CREATING THE OFFICE OF PUBLIC ENGINEER

## An Ordinance Creating the Office of Public Engineer

*Be it Ordained by the City Council of the City of.....  
 Illinois (or President and Board of Trustees of the Village of.....  
 ....., as the case may be):*

**SECTION 1. Public Engineer—Term of Office.**—That there be and is hereby created the office of Public Engineer of the City of.....  
 ....., Illinois, who shall hold his office for the term of one year and until his successor shall be appointed and qualified.

**SEC. 2. How and When Appointed.**—Said Public Engineer shall be appointed by the Mayor, by and with the advice and consent of the City Council, on the.....day of.....19...., or as soon thereafter as may be, and annually thereafter.

**SEC. 3. Bond—Amount of.**—He shall, before assuming the duties of his office, take and subscribe the oath prescribed by law for city officers, and shall execute a bond to the city in the penal sum of.....  
 .....Thousand Dollars, with sureties to be approved by the City Council, conditioned upon the faithful performance of the duties of his office, and that he will pay all moneys and deliver over all property received by him or coming into his possession to the proper officers of this city, according to law and the ordinances of this city.

**SEC. 4. Duties of Engineer.**—The Public Engineer shall devote his entire time (or as much of his time as may be necessary) to the discharge of the duties of his office. He shall, when required by the Mayor, City Council or any committee thereof, make out and submit plans, estimates and specifications for any public work which may be proposed or ordered by the City Council. He shall also, by virtue of his said office, be a member of the Board of Local Improvements of this city, and as such perform all such duties as may be enjoined upon him by law or required by the said Board.

**SEC. 5. Shall Superintend all Public Work—Make Report, Etc.**—He shall, when required by the Mayor, City Council or any proper officer thereof, and as often as may be necessary, examine all public work under his charge, and see that the same is properly executed; and if the contractor thereafter shall neglect or refuse to execute such work in accordance with his contract and specifications, said Engineer may suspend the work and shall thereupon report the facts to the Mayor.

**SEC. 6. Shall Inspect, Receive and Measure Material—Audit Bills, Etc.**—He shall, when required, receive, inspect and measure all material to be used in any public work of the city, and if necessary, shall keep an accurate account of the quantity and quality of the same, the cost thereof, from whom received and for what purpose used, or to be used; and shall examine all bills for material so received by him or in con-



nection with his department, and, if found correct, shall certify same to the City Council for allowance.

**SEC. 7. *Shall Mark Grade, Etc.***—He shall, without charge, give or mark the grade of any street or alley, where established, at the request of any person desiring to erect any building or enclosure, or to lay any sidewalk thereon. He shall make all surveys within and for said city that he may be called upon to make, and shall employ the necessary chainmen and such other assistants as the City Council may authorize.

**SEC. 8. *Shall Keep Plats of All Surveys, Etc.***—Said Engineer shall keep in his office, plats of all grades or boundaries of streets and alleys established by the City Council, correcting the same when any grade shall be changed, and adding thereto when any new grade or boundary shall be established. He shall also keep correct surveys of all public sewers within the city, showing the location, length and dimensions of the same, respectively. He shall record in a suitable book, to be provided by the city, the profiles of all surveys of grades and boundaries established, and preserve the original papers relating thereto, and shall otherwise keep a systematic record of all the transactions pertaining to his office.

**SEC. 9. *Private Drains—Shall Issue Permits—Penalty.***—Any person wishing to connect or to have connected any private drain or sewer with any public sewer, shall first apply to and obtain a written permit from the City Engineer therefor, whose duty it shall be to prescribe the mode of tapping the public sewers, the size of the openings therein, and the materials to be used in such connections. The person obtaining such permit shall present the same to the Superintendent of Streets (or to such other person as shall be appointed by the Mayor for that purpose), under whose direction and supervision the work of making such sewer connection shall be done. Whoever shall violate or shall fail to comply with any of the requirements of this section, shall be subject to a penalty of not less than five dollars nor more than one hundred dollars for each offense.

**SEC. 10. *Shall Make Annual Report for Fiscal Year.***—The City Engineer shall, annually, on or before the first.....in.....of each year, make out and submit to the City Council, a report, showing in detail the public works or improvements during the preceding fiscal year, and the cost thereof to the city.

**SEC. 11. *Records of—Shall be Preserved.***—Said Engineer shall carefully preserve, in his office, all plats and records of surveys, and all books, maps and papers pertaining thereto; and upon the expiration of his term of office, or his resignation thereof, or removal therefrom, he shall, on demand, deliver to his successor in office, all such books, plats, maps, records and effects of every description, belonging to the city or appertaining to said office.

(Here such other duties as may be desired may be prescribed.)

**SEC. 12. *Compensation.***—There shall be paid to said Public Engineer as salary in lieu of all other fees, perquisites and emoluments, the sum of \$.....per annum, payable in equal monthly installments (a); provided, however, that in addition to the compensation above provided for,

there may be allowed to said Engineer, or to such other Engineer as the Board of Local Improvements may employ for that purpose, and paid from funds specially provided for, such reasonable compensation as may be authorized or allowed by the Board of Local Improvements of this city, for services performed or to be performed, by said Engineer, in connection with the preparation of maps, plats, plans, profiles and specifications for the making of local improvements and for the inspection of such work.

SEC. 13. This ordinance shall be in full force and effect from and after its passage and publication.

SEC. 14. All ordinances or parts of ordinances in conflict herewith shall be and the same are hereby repealed.

## FORM NO. 7

### ORDINANCE CREATING OFFICE OF SUPERINTENDENT OF STREETS

#### An Ordinance Creating the Office of Superintendent of Streets.

*Be it Ordained by the City Council (or President and Board of Trustees of the Village, as the case may be) of the City of ....., Ill.:*

SECTION 1. *Superintendent of Streets—Term of Office.*—That there be and is hereby created the office of Superintendent of Streets of the City of ....., Illinois, who shall hold his office for the term of one year and until his successor is appointed and qualified.

SEC. 2. *How and When Appointed.*—The Superintendent of Streets shall be appointed by the Mayor by and with the advice and consent of the City Council on the.....day of....., 19...., or as soon thereafter as may be and annually thereafter.

SEC. 3. *Oath—Bond.*—He shall, before entering upon the duties of his office, take and subscribe the oath prescribed by law for city officers, and shall execute a bond to the City of .....in the penal sum of.....Thousand Dollars, with such sureties as the City Council shall approve, conditioned upon the faithful performance of the duties of his office and the payment of all moneys and the turning over of all property that may be received by him, according to law and the ordinances of said city, to the proper officers of this city.

SEC. 4. *Duties—Repairs and Unsafe Places.*—Said Superintendent shall have charge of the improvement, repairing and cleaning of all streets, avenues and alleys in the city, and shall supervise the construction and repair of all sidewalks therein; but no improvement or repairs, except such as may be immediately necessary, shall be made by him without

the previous order of the City Council. He shall, without delay, cause all unsafe places in any street or alley, bridge, culvert, and all other unsafe public places, to be repaired, and report the cost thereof to the City Council for allowance.

**Sec. 5. *Shall Enforce Ordinances.***—He shall cause all ordinances in relation to streets, alleys and sidewalks to be enforced, and shall prosecute all persons for violations thereof. He shall carry into effect all such orders, general or special, as he may receive from the City Council, the Mayor, or Committee on Streets and Alleys, and for any wilful neglect or refusal to perform any duty required of him by the laws or ordinances of said city, he shall be liable to removal from office.

**Sec. 6. *Shall Clean Streets and Alleys Annually and Recommend Improvements.***—He shall, annually, in the spring of the year, under the directions of the Committee on Street and Alleys, cause the streets, avenues and alleys, where needed, to be cleaned and the gutters opened, and shall, as far as it is practicable, keep them in that condition during the year. He shall, from time to time, examine the sewers, culverts, bridges, crosswalks and sidewalks, and report the condition of the same to the City Council, and recommend such improvements or repairs as he may deem necessary.

**Sec. 7. *May Employ Laborers, Teams, Etc.—Shall Superintendent Same—Shall Supervise Connections of Sewers, Etc.***—He may, by authority of the City Council, employ such numbers of laborers, teams and carts as shall be necessary for cleaning and repairing the streets and alleys, and at such prices as shall be fixed by the City Council, not exceeding the customary rates paid by others for similar labor or service. He shall oversee and direct the street laborers and workmen, and require them to labor faithfully, and shall keep, in a suitable book, a correct account of their time. He shall also supervise all connections of private drains or sewers with the public sewers, and shall see that the same are made in such manner that no injury is done to the public sewers.

**Sec. 8. *To Keep List of Tools—Shall Turn Over to Successor.***—It shall be the duty of the Superintendent of Streets to keep a correct list of all implements, materials and other property of the city, in his charge or possession; and upon the expiration of his term of office, or his resignation thereof, or removal therefrom, he shall deliver said property to his successor in office, taking a receipt therefor, which he shall immediately file with the City Clerk, who shall credit him with the same, and charge his successor therewith.

**Sec. 9. *Member of Board of Local Improvements.***—He shall, by virtue of his said office, be a member of the Board of Local Improvements of this city, and as such perform all such duties as may be enjoined upon him by law or required by said Board.

**Sec. 10. *Make Monthly Report to Council.***—Said Superintendent shall, on the first Monday of each and every month, report to the City Council in writing, a statement of all expenditures under his supervision during the preceding month, specifying the purpose of such expenditures, and

the different wards in which made, and, if required, the persons to whom made. No account presented or certified by him shall be allowed, or warrant issued thereon, unless it shall be so rendered as to show to what account and ward it is chargeable.

SEC. 11. This ordinance shall be in full force and effect from and after its passage and publication.

SEC. 12. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

## FORM NO. 8

### RESOLUTION OF BOARD OF LOCAL IMPROVEMENTS ORIGINATING SCHEME—PAVING

#### BRICK PAVING IMPROVEMENT

*Be it Resolved*, By the Board of Local Improvements of the City of ....., Illinois, That there be constructed on and along .....Street, from.....to....., in said city, a local improvement, as follows:

That the roadway of.....Street, for the distance and between the points aforesaid, and the roadway of all intersecting streets and alleys lying within said portion of said.....Street, and not included in the roadway thereof, shall be improved by *grading, curbing and paving* the same. (Here set out a general description of the nature, character and extent of the improvement, such as kind and character of material to be used in curbing and paving, width of paving, manner of construction and the like.)

The estimate of the cost of this improvement, as compiled and ascertained by, and certified over the signature of the (Engineer or President of the Board of Local Improvements, as the case may be), be and the same is hereby approved and ordered made a part of the record of this resolution.

*Be it further Resolved*, That this Board fix....., the..... day of....., A. D. 19...., at the hour of.....o'clock .....M. (not less than ten days after adoption of resolution), at the office of the Board of Local Improvements of this city (or any other place in the municipality agreed upon by the Board), as the time and place for the public consideration of the said proposed improvement.

*Be it further Resolved*, That notice of the time and place of such public consideration, be prepared and mailed in manner provided by law.

*Be it further Resolved*, That this resolution be at once transcribed upon the records of this Board.

FORM NO. 9

RESOLUTION OF BOARD OF LOCAL IMPROVEMENTS  
ORIGINATING SCHEME—SEWER

SEWER IMPROVEMENT

*Be it Resolved*, By the Board of Local Improvements of the City of  
....., Illinois, That there be constructed in and along  
.....Street, from.....to.....  
....., in said city, a local improvement as follows:

That there shall be constructed in and along.....  
.....Street, for the distance and between the points aforesaid, a sewer,  
with man-holes, catch-basins and necessary connections. Said sewer shall  
be cylindrical in form, etc. (Here set out general description, nature, ex-  
tent and character of improvement.)

The estimate of the cost of said improvement, as compiled and ascer-  
tained by, and certified over the signature of the (Engineer or President  
of the Board, as the case may be), be and the same is hereby approved  
and ordered made a part of the record of this resolution.

*Be it further Resolved*, That this Board fix....., the.....  
day of....., A. D. 19...., at the hour of .....  
o'clock.....M. (not less than ten days after adoption of resolution),  
at the office of the Board of Local Improvements of this city (or any  
other place in the municipality agreed upon by the Board), as the time  
and place for the public consideration of the proposed improvement.

*Be it further Resolved*, That notice of the time and place of such  
public consideration, be prepared and mailed in manner as prescribed by  
law.

*Be it further Resolved*, That this resolution be at once transcribed upon  
the records of this Board.

FORM NO. 10

ESTIMATE OF THE COST TO THE BOARD OF LOCAL  
IMPROVEMENTS

....., Ill., ..... 19....

*To the Board of Local Improvements of the City of.....*  
*Ill.:*

Gentlemen:—I do hereby certify that the estimate of the cost of the  
local improvement of.....Street, from.....  
.....to.....Street, in the City of.....  
....., including labor, material and all lawful expenses attending the

same, is the sum of.....Dollars, itemized as follows:

(The cost may be itemized as follows:)

	Dollars	Cents
.....square yards of vitrified brick paving on cement concrete foundation.....inches thick with a sand cushion.....inches in average thickness, and an asphalt filler surface dressed with sand, complete in place, at.....per square yard.....	.....	.....
.....lineal feet of.....curbing set on....., complete in place, at.....per lineal foot.....	.....	.....
.....cubic yards excavating, grading and preparing sub-grade, at.....per cubic yard .....	.....	.....
(Add other substantial component elements of improvement, if any.)		
Vitrified clay pipe sewer, including.....inch "Y" branches and all necessary fittings and cementing joints with.....cement mortar, complete in place, as follows:		
.....lineal feet 6-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 8-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 10-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 12-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 15-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 18-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 20-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 22-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 24-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 27-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 30-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....
.....lineal feet 36-inch sewer pipe at .....	.....	.....
.....per lineal foot.....	.....	.....

	Dollars	Cents
.....cubic yards excavating.....refilling		
sewer trenches, at.....per cubic yard....		
.....brick man-holes, complete with cast iron		
covers, at.....each.....		
.....brick catch-basins, complete with cast		
iron covers, at.....each.....		
(And so on itemize every substantial component		
element of the improvement.)		
Court costs and necessary lawful expenses (a)		
as provided for by Section 94 of an Act entitled:		
"An Act Concerning Local Improvements," ap-		
proved June 14th, 1897, as amended.		
TOTAL .....		

(Signed) .....,  
 .....of the Board of Local Improvements of.....  
 ....., Illinois.

## FORM NO. 11

### MINUTES OF THE MEETING OF THE BOARD OF LOCAL IMPROVEMENTS. ADOPTING RESOLUTION

Meeting of the Board of Local Improvements of.....,  
 Illinois, held at his office this.....day of.....,  
 19....

Present ....., President, and.....  
 and ....., members.

Mr. ....offered the following resolution and moved  
 its adoption, which motion being seconded, was unanimously carried.

(Here copy of resolution.)

The estimate of the cost of the improvement contemplated by said  
 resolution, prepared by the.....(and in said resolution  
 referred to and approved) or (on motion approved by said Board and  
 itemized to its satisfaction), is as follows:

(Here copy estimate.)

Thereupon on motion the meeting adjourned.

.....President.  
 .....Secretary.

## FORM NO. 12

### FORM NOTICE FOR PUBLIC HEARING

....., Ill., .....19....

You are hereby notified that the Board of Local Improvements of  
 the City of....., adopted a resolution that a local im-

provement be made in the City of....., Illinois, as follows:

That (here set out substance of resolution, descriptive of improvement).

That the estimate of the cost of the said proposed improvement is as follows: (Here set out items of estimate.) That in and by said resolution, the said Board of Local Improvements has fixed....., the.....day of....., 19...., at..... o'clock.....M., at its office (or other place fixed in the resolution), in said city, as the time and place for the public consideration of the proposed improvement.

The extent, nature, kind, character and estimated cost of said proposed improvement, may be changed by said Board at the said public consideration, as provided by law.

All persons desiring to be heard, will then be heard on the subject of the necessity for the said proposed improvement, the nature thereof, and the cost as estimated.

.....  
.....  
.....

Board of Local Improvements....., Ill.

## FORM NO. 13

### AFFIDAVIT OF MAILING NOTICES OF PUBLIC HEARING

STATE OF ILLINOIS,  
County of ..... } ss.  
City of ..... }

This affiant, ....., being first duly sworn on oath, deposes and says: That under the direction of the Board of Local Improvements of the City of ....., Illinois, he sent by mail, on the.....day of....., A. D. 19...., postage prepaid, directed to the persons who paid the general taxes for the last preceding year on each lot, block, tract or parcel of land, fronting on the line of the proposed improvement of..... Street, from.....to....., a notice of the time and place of the public hearing of said proposed improvement before said Board of Local Improvements, of which notice the following is substantially a copy:

(Here copy or attach notice.)

Affiant further on oath says that he made a careful examination of the books of the Collector, showing the payment of general taxes during the last preceding year upon the lots, blocks, tracts and parcels of land fronting on said proposed improvement, and the said notices were sent as aforesaid, to the persons he thus found to have paid the said general



taxes on said respective lots, blocks, tracts or parcels of land fronting on said proposed improvement.

Subscribed and sworn to before me, this.....day of.....  
....., 19....

.....Notary Public.

## FORM NO. 14

### RESOLUTION OF BOARD OF LOCAL IMPROVEMENTS ADHERING TO THE PROPOSED SCHEME

**WHEREAS**, On evidence submitted, this Board finds that notices of the time and place of the public consideration of the proposed improvement of (here describe improvement sufficiently to identify it), as provided for and contemplated in and by the resolution adopted by this Board at its meeting held on the.....day of....., A. D. 19...., have been sent by mail in manner and form prescribed by statute.

**AND WHEREAS**, This Board finds that all steps by law required have been taken in manner by law required and that it has full and complete jurisdiction in the premises; therefore

*Be it Resolved*, By the Board of Local Improvements of the City of ....., Illinois, that it adhere to the proposed scheme for the improvement above mentioned, as originally provided for in and by the resolution aforementioned, and that the local improvement as therein contemplated be made.

*Be it further Resolved*, That the City Attorney (or any other qualified officer) prepare an ordinance providing for said proposed improvement in accordance herewith, and that such ordinance be submitted to the City Council of the said City of ....., together with the recommendation of this Board.

*Be it further Resolved*, That the (Engineer or President of this Board, as the case may be), prepare over his signature, an estimate of the cost of said proposed improvement as originally contemplated, itemized and certified as required by law.

## FORM NO. 15

### RESOLUTION OF BOARD ABANDONING THE SCHEME FOR THE PROPOSED IMPROVEMENT

*Be it Resolved*, By the Board of Local Improvements that the proposed scheme for the improvement of (here designate improvement) as contemplated by the resolution of this Board, adopted on the.....day of....., A. D. 19...., be and the same is hereby abandoned.

## FORM NO. 16

RESOLUTION CHANGING, ALTERING OR MODIFYING THE  
PROPOSED SCHEME

WHEREAS, On evidence submitted, this Board finds that notices of the time and place of the public consideration of the proposed improvement of (here describe improvement sufficiently to identify it), as provided for and contemplated in and by the resolution adopted by this Board at its meeting held on the.....day of....., A. D. 19...., have been sent by mail in manner and form prescribed by statute.

AND WHEREAS, This Board finds that all steps by law required have been taken in manner by law required and that it has full and complete jurisdiction in the premises.

AND WHEREAS, This Board considers it most desirable that the extent (or kind, nature, character or estimated cost, as the case may be), of the proposed scheme for the said proposed improvement as provided for in the said resolution adopted by this Board, be changed (altered or modified, as the case may be) as hereinafter provided.

*Therefore, be it Resolved*, By the Board of Local Improvements of the City of....., Illinois, that the above mentioned improvement be made pursuant to the resolution heretofore adopted by this Board, and hereinbefore referred to, and that said resolution, with the changes hereinafter prescribed for, be adhered to. That the extent (or nature, kind, character or estimated cost, as the case may be) of the said proposed scheme, for the said proposed improvement, be changed (altered or modified, as the case may be), as follows, to-wit: (Here set out changes, alterations or modifications, by a general description).

*Be it further Resolved*, That the City Attorney (or any other qualified officer) prepare an ordinance providing for said proposed improvement in accordance herewith, and that such ordinance submitted to the City Council of said City of ....., together with the recommendation of this Board.

*Be it further Resolved*, That the (Engineer or President of this Board, as the case may be), prepare over his signature, an estimate of the cost of said proposed improvement as changed (altered or modified) as above provided, itemized and certified as required by law.

## FORM NO. 17

RESOLUTION WHERE CHANGE OF PROPOSED SCHEME  
INCREASES THE ESTIMATED COST OF THE IMPROVE-  
MENT MORE THAN TWENTY PER CENT

WHEREAS, On evidence submitted, this Board finds that notices of the time and place of the public consideration of the proposed improvement

of (here describe consideration sufficiently to identify it), as provided for and contemplated in and by the resolution adopted by this Board at its meeting held on the.....day of....., A. D. 19...., have been sent by mail in manner and form prescribed by statute.

AND WHEREAS, This Board finds that all steps by law required, have been taken in manner by law required and that it has full and complete jurisdiction in the premises.

AND WHEREAS, This Board considers it most desirable that the extent (or nature, kind, character or estimated cost, as the case may be) of the proposed scheme for the said proposed improvement as provided for in the said resolution adopted by this Board, be changed (altered or modified, as the case may be) in manner hereinafter provided.

*Therefore be it Resolved*, By the Board of Local Improvements of the City of....., Illinois, that the above mentioned improvement be made pursuant to the resolution heretofore adopted by this Board and hereinabove referred to, *except* that the extent (or nature, kind, character or estimated cost, as the case may be) of the said proposed scheme for the said proposed improvement be changed (altered or modified, as the case may be), as follows, to-wit: (Here describe changes, alterations or modifications in a general way.) And it appearing that the estimate of the cost of said improvement, by reason of the changes (alterations or modifications), will be increased more than twenty per cent.

*Be it further Resolved*, That a further public hearing be had upon the proposed scheme for the making of the said proposed improvement as herein changed (altered or modified), and that this Board fix....., the.....day of....., 19...., at the hour of....o'clock ....M., at the office of the Board of Local Improvements of this City (or any other place agreed upon by the Board), as the time and place for the further public consideration of the proposed improvement.

*Be it further Resolved*, That notices of the time and place of such further public consideration be prepared and sent by mail as provided by law.

## FORM NO. 18

### RESOLUTION ADHERING TO PROPOSED SCHEME AT FURTHER PUBLIC HEARING

WHEREAS, On evidence submitted, this Board finds that notices of the time and place of the further public consideration of the proposed improvement of (here describe improvement sufficiently to identify it), as provided for and contemplated in and by the resolution adopted by this Board at its meeting held on the.....day of....., A. D. 19...., have been sent by mail in manner and form prescribed by statute.

AND WHEREAS, This Board finds that all steps by law required have been taken in manner by law required, and that it has full and complete jurisdiction in the premises.

*Therefore be it Resolved*, By the Board of Local Improvements of the City of....., Illinois, that this Board adhere to the proposed scheme for the improvement above mentioned, provided for in and by its resolution adopted on the.....day of....., A. D. 19...., as changed (altered or modified) by its resolution adopted on the.....day of.....A. D. 19...., and that said improvement as contemplated in said resolutions be made.

*Be it further Resolved*, That the City Attorney (or any other qualified officer) prepare an ordinance providing for said proposed improvement in accordance herewith, and that such ordinance be submitted to the City Council of the said City of....., together with the recommendation of this Board.

*Be it further Resolved*, That the (Engineer or President of this Board, as the case may be) prepare over his signature, an estimate of the cost of said proposed improvement as herein contemplated, and itemized and certified as required by law.

## FORM NO. 19

### MINUTES OF MEETING OF THE BOARD OF LOCAL IMPROVEMENTS—PUBLIC HEARING

#### OFFICE OF THE BOARD OF LOCAL IMPROVEMENTS

Meeting of the Board of Local Improvements held at its office on the .....day of....., 19...., at the hour of....o'clock .....M.

Present....., President, and.....  
....., Members.

Meeting was called to order by the President for the purpose of hearing the representations of all persons desiring to be heard on the subject of the necessity for the proposed improvement of (here designate improvement), the nature thereof, and the cost as estimated, pursuant to the resolution heretofore adopted by this Board at its meeting held on the .....day of.....19....

All persons desiring to be heard, having been heard, the following resolution was presented and unanimously (or if not unanimously, then state facts), adopted, to-wit:

(Here copy resolution.)

Thereupon, on motion, the meeting adjourned.

.....,  
President.

.....,  
Secretary.

FORM NO. 20

ESTIMATE OF THE COST TO THE CITY COUNCIL

....., Ill., ..... 19....  
*To the Mayor and City Council and the Board of Local Improvements of  
the City of....., Illinois.*

Gentlemen:—I do hereby certify that the estimate of the cost of the  
local improvement of .....

.....  
as directed to be made by the Board of Local Improvements of said city,  
all of which are embodied in the draft of an ordinance hereto attached,  
including labor, material and all other lawful expenses attending the  
same, is the sum of.....Dollars,  
itemized as follows:

(Here itemize—See Form No. 10.)

I do further certify that, in my opinion, the said estimate does not  
exceed the probable cost of said improvement proposed and the lawful  
expenses attending the same.

.....,  
..... of Board of Local Improvements  
of the City of....., Ill.

FORM NO. 21

MEETING OF THE BOARD OF LOCAL IMPROVEMENTS  
APPROVING ESTIMATE AND ORDINANCE

OFFICE OF THE BOARD OF LOCAL IMPROVEMENTS

Meeting of the Board of Local Improvements of.....,  
Illinois, on the.....day of....., A. D. 19...., at the hour  
of..... o'clock.....M.

Present....., President, and.....  
.....Members.

The following resolution was introduced and, on motion of.....  
....., was unanimously adopted:

“*Be it Resolved*, That the draft of an ordinance providing for the  
improvement of .....  
from ..... to.....  
together with the estimate of the cost thereof, prepared by the.....  
.....of this Board, be and the same are hereby  
approved and ordered transmitted to the City Council of the City of  
....., Illinois, with the recommendation  
of this Board.”

Thereupon meeting adjourned.

.....President.  
.....Secretary.

## FORM NO. 22

RECOMMENDATION OF ORDINANCE BY BOARD OF  
LOCAL IMPROVEMENTS

## OFFICE OF THE BOARD OF LOCAL IMPROVEMENTS

....., Ill., ....., 19....

*To the Mayor and City Council of the City of.....,  
Illinois:*

Gentlemen:—The Board of Local Improvements herewith transmits to your Honorable Body a draft of an ordinance entitled, “An Ordinance .....,” which said Board caused to be prepared, for the local improvement of..... Street, from ..... to ..... Street, by (here state nature of improvement).

The said Board of Local Improvements hereby recommends to your Honorable Body the making of said improvement, the extent, nature, character, locality and description of which is set forth in said draft of ordinance herewith transmitted, and also recommends to your Honorable Body the passage of said ordinance.

The said Board of Local Improvements also herewith transmits to your Honorable Body an estimate of the cost of said improvement as finally determined upon by said Board and provided for in said draft of ordinance herewith transmitted.

Respectfully submitted,

.....,  
.....,  
.....,

Board of Local Improvements, City of....., Ill.

## FORM NO. 23

ORDINANCE PROVIDING FOR PAVING—INSTALLMENTS—  
BONDS—SPECIAL ASSESSMENTS

ORDINANCE No. ....

An Ordinance Prepared and Transmitted and Its Passage Recommended by the Board of Local Improvements of the City of....., Ill., to the City Council of said City, Providing for the Local Improvement of..... Street from..... to....., by Grading, Curbing and Paving.

*Be it Ordained by the City Council of the City of .....,  
Ill.:*

SECTION 1. That a local improvement shall be made within the City of

....., Illinois, the nature, character, locality and description of which said improvement is as follows, to-wit:

That the roadway of.....Street, in the City of....., from.....to....., and also the roadway of all intersecting streets and alleys lying within said portion of said.....Street, and not included in the roadway thereof (except at the intersection of.....Street), be and the same is ordered improved by *grading, curbing and paving*, as follows:

(Here set out a detailed description of the extent, nature, character and locality of the improvement, so that the ordinance itself contains sufficient specifications to make it susceptible of fair and uniform competition when bids are invited thereon.)

(Among other things, the ordinance shall contain full and complete specifications relating to the location and width of roadways, curbing, gutters, grade of the roadway and curb, datum plane, grading, excavating and filling, including foundation of pavement and ingredients, such as cement, sand, broken stone, mixing and laying concrete, sand cushion, bricks for paving, filler, expansion joints, or, if a composite is specified, then the nature and character of the composite and ingredient materials, foundation or base for curbing, drains, catch basins or inlets, and other parts of the improvement; in short, complete specifications for all the constituent and component parts of the improvement.)

SEC. 2. That the recommendation of the Board of Local Improvements of the City of....., providing for said improvement, together with the estimate of the cost thereof, made by the.....of said Board, both hereto attached, be and the same are hereby approved.

SEC. 3. That the said improvement herein provided for, and the whole cost of said improvement, including the sum of.....Dollars (\$.....), being the amount included in the estimate of the said.....hereto attached, as the cost of making, levying and collecting the assessment herein, be paid for by special assessment to be levied upon the property specially benefited to the amount that the same may be legally assessed therefor, in accordance with the act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, and amendments thereto; and the remainder of such cost and expenses be paid by general taxation, and that the said sum of \$.....shall be applied towards the cost of making, levying and collecting such assessment, as provided by said Act of said General Assembly, and the amendments thereto.

SEC. 4. That the aggregate amount herein ordered to be assessed against the property and also the assessment against each lot, block, tract or parcel of land therein assessed, shall be divided into.....installments in the manner provided for by the statute in such cases made

and provided, and each of said installments shall bear interest at the rate of five per centum per annum, according to law.

SEC. 5. That for the purpose of anticipating the collection of the aforesaid second and succeeding installments provided for in this ordinance, the said City of.....shall issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually, and signed by the Mayor and City Clerk of said City, under the corporate seal of said City; said bonds to be issued in the sum of One Hundred Dollars (\$100.00) each, or some multiple thereof, and shall be issued in accordance with and shall in all respects conform to the provisions of the said act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14, 1897, and amendments thereto.

SEC. 6. That the Mayor, City Attorney or Corporation Counsel, as the case may be, of the City of.....be and he is hereby directed to file a petition in the name of the City of....., in the..... Court of.....County, Illinois, praying that steps be taken to levy a special assessment for said improvement, in accordance with the provisions of this ordinance and the laws of the State of Illinois.

SEC. 7. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SEC. 8. This ordinance shall be in full force and effect from and after its passage.

## FORM NO. 23A

### ORDINANCE PROVIDING SPECIFICATIONS FOR BRICK PAVEMENT WITH ASPHALT FILLER ON PORTLAND CEMENT CONCRETE BASE

An Ordinance Prepared and Transmitted and its Passage Recommended by the Board of Local Improvements of the City of....., Illinois, to the City Council of the said City, providing for the Improvement of.....Street, from.....to....., by Grading, Curbing and Paving.

*Be it Ordained by the City Council of the City of....., Ill.:*

SECTION 1. That a local improvement shall be made within the City of....., Illinois, the nature, character, locality and description of which said improvement is as follows, to-wit:

That the roadway of.....Street, in said City of....., from.....to....., and also the roadways of all intersecting



streets and alleys lying within said portion of said.....  
 Street, and not included in the roadway thereof (except at the intersection  
 of.....Street), be and the same are ordered  
 improved by grading, curbing and paving as follows:

(Here set out a detailed description of the extent, nature, character and  
 locality of the improvement, together with a full and complete description  
 relating to the width of the roadway, grade of roadway and curb, crown  
 of roadway, datum plane, and other matters not included herein.)

(Also set out full specifications for drainage, by giving location, size,  
 grade, depth, connections, specifications for inlets and catch basins, giving  
 full description of size of openings, dimensions of catch basins and full  
 description as to their construction.)

### SPECIFICATIONS FOR MATERIALS

1. *Portland Cement.* Portland cement shall conform to the definition  
 and meet the requirements of the standard specifications and tests for  
 Portland cement of the American Society for Testing Materials, serial  
 designation C 9-17.

2. *Stone Curbing.* Curb stone shall be of the best quality of hard  
 sand stone, compact and homogeneous and free from cracks, pockets, lumps,  
 seams and other defects. Curb stone shall be slabs, ..... inches in  
 depth, and not less than four feet in length, with the top edge dressed  
 to a uniform thickness of ..... inches. It shall be dressed on its  
 face to a depth of not less than twelve (12) inches, and on the back for  
 a depth of not less than four (4) inches from the top. The ends shall  
 be dressed at right angles to the top for a depth of fifteen (15) inches.  
 The top shall have a bevel of one-eighth inch.

3. *Brick.* All brick shall be No. 1 Pavers and shall be thoroughly  
 annealed, tough and durable, regular in size and evenly burned. When  
 broken they shall show a dense, stone-like body, free from lime, large air  
 pockets, marked laminations or cracks which would tend to weaken the  
 structure.

The size of the brick shall be 3 inches in depth, 4 inches in width and  
 $8\frac{1}{2}$  inches in length. The brick shall have a double bevel or bulge of  
 $\frac{3}{32}$  inch on each end making the extreme length of the brick  $8\frac{11}{16}$   
 inches when measured over the bulges. The variations from the above  
 dimensions shall not exceed  $\frac{1}{8}$  inch in width or depth nor more than  $1\frac{1}{4}$   
 inches in length. The brick shall not have kiln marks exceeding  $\frac{1}{4}$  inch in  
 height or depth.

The brick shall not lose of their weight more than ..... per cent  
 when subjected to the Rattler test conducted in accordance with the stand-  
 ard specifications for paving brick adopted by the American Society for  
 Testing Materials in 1915.

All brick shall be unloaded from wagons or cars by clamps and neatly  
 piled adjacent to the work before the grading is finished. Under no cir-  
 cumstances shall brick be dumped from wagons or cars, nor shall they  
 be thrown from wagons to piles, or from cars to wagons. Brick shall be

stacked upon turf or on straw, and not be piled where they will be spattered with dirt and mud.

4. *Asphalt Filler.* Asphalt filler shall be homogeneous, free from water and shall not foam when heated to 200° C. (392° F.). It shall meet the following requirements:

- (a) Penetration at 32° F. (200 gra. 1 minute) not less than 10;  
Penetration at 77° F. (100 gra. 5 seconds) 30 to 50;  
Penetration at 115° F. (50 gra. 5 seconds) not more than 110.
- (b) Melting point (Ring and Ball) not less than 65° C. (149° F.).
- (c) Flash Point: Not less than 200 C. (392° F.).
- (d) Loss on Evaporation: 325° F., 5 hra., less than 1%.
- (e) Reduction in penetration at 77° F., due to heating specified in clause (d), not to exceed 50%.
- (f) Solubility in Carbon Disulphide; not less than 99%.
- (g) Solubility of the total bitumen present in Carbon Tetrachloride; not less than 99%.
- (h) Ductility: Not less than 3 cm. Speed of pull 5 cm. per minute.

5. *Fine Aggregate.* Fine aggregate shall consist of clean sand or screenings from hard durable rock or gravel. Fine aggregate shall be free from soft friable material, shale or slate, vegetable or other organic matter. It shall not contain clay or silt in excess of five (5) per cent. Fine aggregate shall be uniformly graded in grain sizes. All shall pass a one-quarter ( $\frac{1}{4}$ ) inch sieve.

6. *Coarse Aggregate.* Coarse aggregate shall consist of broken stone which shall be sound. It shall be uniformly graded in size between a maximum of what will pass a one and one-half ( $1\frac{1}{2}$ ) inch and a minimum that will be retained on a one-quarter ( $\frac{1}{4}$ ) inch revolving screen with circular openings. It shall be reasonably clean and free from dust.

7. *Water.* The water shall be clean, free from oils, acids, alkalis and vegetable matter.

## CONSTRUCTION OF THE BRICK PAVEMENT

*Grading.* The roadway herein provided to be improved, is to be graded to such grades, sub-grades and cross-sections, as to conform to the proper crown of the pavement as set forth herein.

Earth in excavation shall be removed with the plow and scraper or other device, to such a depth as when rolled will conform to the true sub-grade. The roller for this purpose shall weigh not less than five (5) and not more than ten (10) tons.

Earth in embankment must be applied in layers of not more than six (6) inches in thickness, and each layer thoroughly rolled, and in both excavation and embankment the sub-grade shall have a uniform density.

All spongy and soft earth that cannot be made firm by rolling shall be removed and replaced with stone or gravel. After the roadbed has been rolled ready for the pavement foundation, no loaded or empty wagons or other vehicles that might disturb the finished surface will be permitted thereon, unless the roadbed is provided with a covering of plank.

No work of grading shall be done on any part of the roadway to be paved until the paving materials to be used shall have been delivered along the line of the street in sufficient quantities to fully complete the work for the full length of the roadway disturbed.

*Curbing.* All curbing shall be hauled, distributed and set to grade before the sub-grade is finished, and may then be used as a guide to finish the sub-grade. It should be of a character and of such dimensions as described under subject of curbing in these specifications. At street corners the curbing shall be of the same material and cut to a radius of ..... feet; at alleys the radius should be ..... feet.

*Marginal Curb.* At the end of the pavement and at the end of the street and alley intersections, where the improvement does not join with permanent pavement, a marginal curb shall be placed to the depth of twelve (12) inches, and shall be so set as to conform to the curvature of the street, and of the same material as described for curbing.

*Foundation.* Portland cement, fine and coarse aggregate and water used in the concrete foundation shall meet the requirements as given under specifications for materials.

*Proportions and Mixing.* Cement, fine aggregate and coarse aggregate shall be mixed with water in the proportions of one part cement, three parts fine aggregate and six parts coarse aggregate. These ingredients shall be separately measured and thoroughly mixed. Sufficient water shall be added to produce a concrete or quaky consistency. The mixture shall be revolved not less than one minute after all the ingredients are in the drum. Concrete shall be of uniform consistency with the stone thoroughly mixed with fine aggregate and water.

*Re-Tempering.* Re-tempering, that is, re-mixing with additional water, mortar or concrete that has partially hardened, will not be permitted.

*Depositing Concrete.* Concrete for the base shall be deposited upon a moist subgrade. Concrete shall be discharged from the mixer uniform in consistency and without separation of the ingredients.

It shall be distributed immediately from side to side of the roadway to the full depth of base required. Concrete shall then be consolidated and surfaced to the required depth, grade and cross section by means of a template, using curbs or side-forms as guide rails.

Concrete shall be deposited closely about all manholes, catchbasins, monument boxes or similar structures and against side-forms or curbs. It shall be spaded thoroughly to bring mortar in contact with such structures. Portions of the base not accessible to template finishing shall be surfaced by hand luting.

At the end of each working period a bulkhead shall be placed at right angles to the center line of the roadway and perpendicular to the surface of the pavement to which the concrete base shall be finished. When work is resumed the bulkhead shall be removed and the exposed face of the concrete wetted before fresh concrete is placed.

*Thickness.* This foundation shall be ..... inches in thickness,

with its upper surface finished parallel to and ..... inches below the grade of the finished pavement.

(Note) The minimum thickness for concrete foundation shall be four (4) inches.

*Freezing Weather.* No concrete shall be mixed or deposited when the air temperature is less than 32° F., unless during the mixing the aggregate shall be heated so that, when placed, the temperature of the concrete shall be not less than 60° F. The pavement shall then be protected by sufficient covering to prevent it from freezing. In no event shall concrete be deposited on a frozen subgrade.

*Protection.* No loaded or empty wagons, trucks or other vehicles that might injure the finished surface of the foundation shall be permitted thereon without proper surface protection.

*Sand Cushion.* Upon the prepared foundation shall be spread a bedding of sand which shall not be more than one (1) nor less than one-half ( $\frac{1}{2}$ ) inch in finished depth. The sand shall not exceed one-quarter ( $\frac{1}{4}$ ) inch in maximum grain size. It may contain loam or other fine material not exceeding fifteen (15) per cent. The bedding shall be shaped to a true surface parallel to the surface of the finished roadway by means of a template extending the entire width of the roadway or by means of hand luting. The bedding shall not be disturbed after shaping and rolling and prior to laying the brick.

*Laying the Brick.* In delivering the brick from the piles for placement in the street, no wheeling in barrows will be allowed on the brick surface, but they shall be carried on pallets or mechanical carriers, in such manner that when delivered to the dropper, they will lie in such a position that each brick in the regular operation of placing it upon the bedding course as prepared, will bring the better side uppermost.

For closures, nothing less than three (3) inch bats shall be used with the fractured edges laid toward the center of the pavement, a piece being cut off of the adjacent whole brick, if necessary, to make a three (3) inch closure space. Broken, chipped, or warped brick not suitable to lay as a whole shall be used for closures and bats as far as practical. All joints shall be broken at least three (3) inches. No course shall deviate from a straight line more than two (2) inches in thirty (30) feet. All brick when laid shall be clean and kept clean until the filler is applied. When conditions of the ground are such that mud would be tracked or carried on to the pavement, the work of laying the brick shall not be allowed.

*Rolling.* After the brick in the pavement have been passed for rolling, and the surface swept clean, the pavement shall be rolled with a self-propelled roller, weighing not less than three (3), nor more than five (5) tons, in the following manner. The brick next the curb or side form shall be tamped with a hardwood tamper to the proper grade. The rolling shall then commence near the curb, or side form at a very slow pace and continue back and forth toward the center until the center of the street is reached; thence, passing to the opposite curb or side-form, it shall be repeated in the same manner to the center of the street. Each backward

passage of the roller shall cover the same path as the corresponding forward passage, and each portion of the pavement shall receive enough even passages of the roller to imbed each brick firmly, evenly, and to a uniform bearing in the bedding course.

The pavement shall then be rolled transversely at an angle of forty-five (45) degrees from curb to curb, repeating the rolling in the opposite forty-five (45) degree direction. Before and after this transverse rolling has taken place, injured brick must be taken up and replaced with perfect ones. The substitute brick must be brought to the true surface by tamping.

*Application of Asphalt Filler.* The surface of the brick after they have been rolled and inspected shall be swept clean and the filler shall be applied as soon after the rolling as possible. All brick shall be filled and completed on the day on which they are laid.

The asphaltic cement shall be heated in a suitable kettle equipped with a thermometer, which will register the temperature of the contents at all times. The asphaltic cement shall, at no time, be heated to a greater temperature than its flashpoint nor poured at a temperature of less than three hundred (300) degrees, Fahrenheit. In order to insure that the filler will adhere firmly to the brick they shall be clean and thoroughly dry. The filler shall be moved slowly back and forth over the surface by means of suitable squeegees until all the joints are completely filled and the surface entirely covered with a thin coating. Sufficient time shall be allowed after the asphaltic cement is flushed over the surface before using the squeegees to allow it to penetrate to the bottom of the joints. Care must be taken not to squeegee partially cooled asphaltic cement over uncovered brick, thereby bridging the top of the joints and not filling the bottom. All settlement in the joints after the asphalt has cooled shall be corrected by adding filler before placing the top dressing.

A coating of dry, clean, coarse sand or "chatts" passing a No. 4 screen shall then be uniformly spread over the surface to take up the surplus asphalt. The pavement shall then be thoroughly rolled to imbed the surface dressing in the asphalt. After this rolling the pavement may be thrown open to the traffic. Additional material shall be added or any surplus swept up and removed any time within ten (10) days after traffic is allowed over the pavement.

**NOTE:** It is important that a clean, coarse sand be used for surface dressing of asphalt filler coat. Such sand will penetrate the asphalt when rolled, forming a mastic, while very fine sand will merely form a mat on the surface of the asphalt.

**SEC. 2.** That the recommendation of the Board of Local Improvements of the City of..... providing for said improvement, together with the estimate of the cost thereof, made by the ..... of said Board, both hereto attached, be and the same are hereby approved.

**SEC. 3.** That the said improvement herein provided for, and the whole cost of said improvement, including the sum of.....

Dollars (\$.....), being the amount included in the estimate of the said....., hereto attached, as the cost of making, levying and collecting the assessment herein, be paid for by special assessment to be levied upon the property specially benefited to the amount that the same may be legally assessed therefor, in accordance with the act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, and amendments thereto; and the remainder of such costs and expenses be paid by general taxation, and that the said sum of \$..... shall be applied towards the cost of making, levying and collecting such assessment, as provided by said act of said General Assembly, and the amendments thereto.

SEC. 4. That the aggregate amount herein ordered to be assessed against each lot, block, tract or parcel of land therein assessed, shall be divided into ..... installments in the manner provided for by the statute in such cases made and provided, and each of said installments shall bear interest at the rate of five percentum per annum, according to law.

SEC. 5. That for the purpose of anticipating the collection of the aforesaid second and succeeding installments provided for in this ordinance, the said City of ..... shall issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually, and signed by the Mayor and City Clerk of said City, under the corporate seal of said City; said bonds to be issued in the sum of One Hundred Dollars (\$100.00) each, or some multiple thereof, and shall be issued in accordance with and shall in all respects conform to the provisions of the said act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, and amendments thereto.

SEC. 6. That the Mayor, City Attorney, or Corporation Counsel, as the case may be, of the City of ..... be and he is hereby directed to file a petition in the name of the City of ..... in the..... Court of.....County, Illinois, praying that steps be taken to levy a special assessment for said improvement, in accordance with the provisions of this ordinance and the laws of the State of Illinois.

SEC. 7. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SEC. 8. This ordinance shall be in full force and effect from and after its passage,

NOTE:—(1) Ordinance must contain a detailed description of the extent, nature, character and locality of the improvement, so that the ordinance itself contains sufficient specifications to make it fully descriptive of the improvement and make it susceptible of fair and uniform competition when bids are invited thereon. Among other things, the ordinance shall contain full and complete specifications relating to width of road-

ways, curbing, gutters, grade of the roadway and curb, datum plane, grading, excavating and filling, including foundation of pavement and ingredients, such as cement, sand, broken stone, or gravel, mixing or laying concrete, sand cushion, brick for paving, filler, expansion joints, or when a composite is specified, then the nature and character of the composite and ingredient materials—in short, a complete specification of the improvement.

(2) It is entirely proper to incorporate in the ordinance the full and complete specifications for the particular work as prepared by the Engineer.

(3) Although purely optional, it is extremely desirable that the ordinance contain a clause whereby it is provided that contractors shall be required to furnish all foremen or sub-foremen in charge of any particular portion of the work, specifications covering said work, and that they be required to acquaint themselves fully with all requirements for the proper prosecution of the work under their supervision.

## FORM NO. 24

### ORDINANCE PROVIDING FOR PIPE SEWER—INSTALLMENTS —BONDS—SPECIAL ASSESSMENT

ORDINANCE No. ....

An Ordinance Prepared and Transmitted and Its Passage Recommended by the Board of Local Improvements of the City of....., Illinois, to the City Council of said City, Providing for the Local Improvement of.....Street from..... to....., by Constructing in and Along said .....Street for the Distance and Between the Points Aforesaid, a.....Sewer, with Man-holes, Catch-basins and Necessary Connections and Appurtenances.

*Be it Ordained by the City Council of the City of....., Illinois:*

SECTION 1. That a local improvement shall be made within the City of....., Illinois, the nature, character, locality and description of which said local improvement is as follows:

#### SEWER

That a vitrified clay pipe sewer, with necessary connections, laterals, man-holes, catch-basins and all other appurtenances, be and is hereby ordered constructed in and along.....Street, from ..... to....., as follows:

(Here set out description of extent, nature, character and locality of improvement; among other things specify and describe diameter, dimensions, locality, connecting points with existing sewers, and all particulars not covered by following general specifications.)

#### GRADES

.....  
 .....  
 .....

#### EXCAVATION

.....  
 .....  
 .....

#### SEWER PIPE

.....  
 .....  
 .....

#### CEMENT

.....  
 .....  
 .....

#### SAND

.....  
 .....  
 .....

#### BACK-FILLING

.....  
 .....  
 .....

#### HOUSE CONNECTIONS

.....  
 .....  
 .....



**SURPLUS EARTH**

.....  
 .....  
 .....

**MAN-HOLES**

.....  
 .....  
 .....

**CATCH-BASINS**

.....  
 .....  
 .....

**BRICK FOR MAN-HOLES, ETC.**

.....  
 .....  
 .....

**SEWER DISTRICT**

.....  
 .....  
 .....

All property abutting on the line of said sewer, or lying within the sewer district herein, or which may be benefited by said improvement, or has been or may be assessed for special benefits therefrom, may be connected therewith without any additional cost or charge whatever, and permission and authority is hereby given owners and occupants of such property to make and construct any and all necessary connections from such property, with such sewer, subject, however, to such reasonable regulations for the doing of the work and for the joining with said sewer as may be legally prescribed.

SEC. 2. That the recommendation of the Board of Local Improvements of the City of ....., providing for said improvement, together with the estimate of the cost thereof, made by the ..... of said Board, both hereto attached, be and the same are hereby approved.

## FORM NO. 25

## ORDINANCE PROVIDING FOR WATER MAINS, ETC.

An Ordinance Prepared and Transmitted, and its Passage Recommended by the Board of Local Improvements of the City of ....., Illinois, to the City Council of said City, Providing that a Cast-iron Water Main, with Necessary Fire Hydrants, Valves and Fittings, be laid in .....Street, from .....to....., in the City of ....., Ill

*Be it Ordained by the City Council of the City of ....., Illinois:*

SECTION 1. That a local improvement shall be made within the City of ....., Illinois, the nature, character, locality and description of which is as follows, to-wit:

That a cast-iron water main, with necessary fire hydrants, valves and chambers and special fittings, be and the same are hereby ordered laid in .....Street, from .....to ....., as follows:

(Here set out description of improvement, with the particularity stated in preceding forms for ordinances.)

(Concluding sections same as in other ordinances.)

## FORM NO. 26

## ORDINANCE PROVIDING FOR SIDEWALKS

(This is under the general act and not under the special sidewalk act as amended in 1905.)

An Ordinance Prepared and Transmitted and Its Passage Recommended by the Board of Local Improvements of the City of ....., Illinois, Providing for a ..... Sidewalk on ..... Side of ....., from ..... to....., in the City of ....., Illinois.

*Be it Ordained by the City Council of the City of ....., Illinois:*

SECTION 1. That a local improvement shall be made within the City of ....., Illinois, the nature, character, locality and description of which is as follows, to-wit:

That a ..... sidewalk ..... feet wide, be and the same is hereby ordered constructed on ..... side of ..... Street, from .....

Street to .....Street except in front of....., and also except the intersections hereinafter described to-wit:

(Set out description of improvement with the particularity illustrated in preceding forms for ordinances.)

(Sidewalk ordinances must contain substantially the following section in addition to the others applying to improvements generally):

"The owner of any lot, block, tract or parcel of land abutting on the sidewalk hereinabove provided for shall, and there is hereby allowed him, forty (40) days, after the time at which this ordinance shall take effect, in which to build said sidewalk opposite to his land, and thereby relieve the same from assessment; *Provided*, that work so to be done shall in all respects conform to the requirements of this ordinance, said work to be done under the superintendence of the Board of Local Improvements of the City of ....."

NOTE:—Concluding sections same as in other ordinances.

## FORM NO. 27

### SUPPLEMENTAL ORDINANCE AUTHORIZING DIVISION INTO INSTALLMENTS AND ISSUANCE OF BONDS

ORDINANCE No. ....

An Ordinance Authorizing the Division Into Installments of the Special Assessment for the Improvement of .....Street, from ..... to ....., in the City of ....., as Provided for in and by Ordinance No. .... of said City, and to Authorize the Issuance of Bonds to Anticipate Collection of such Deferred Installments.

*Be it Ordained by the City Council of the City of ....., Illinois:*

SECTION 1. That the aggregate amount of the special assessment provided for in and by Ordinance No. .... of the City of ..... entitled "*(here insert title)*," passed by the City Council of the said city on the.....day of....., 191., and approved by the Mayor thereof on the.....day of....., 191., and also the assessment against each lot, block, tract and parcel of land therein ordered to be assessed, shall be divided into.....installments in manner provided by statute in such cases made and provided, and each of said installments shall bear interest at the rate of five per cent. per annum, according to law.

SEC. 2. That for the purpose of anticipating the collection of the second and succeeding installments provided for in this ordinance, the

said City of.....shall issue bonds, payable out of said installments, bearing interest at the rate of five per cent. per annum, payable annually, and signed by the Mayor and City Clerk of said city, under the corporate seal of said city; said bonds to be issued in the sum of One Hundred Dollars (\$100.00) each, or some multiple thereof, which said bonds shall be issued in accordance with, and shall in all respects conform to, the provisions of the act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, and amendments thereto.

SEC. 3. That the.....of this city (*same officer designated in the original ordinance to file petition*) is hereby directed immediately and before the confirmation of the assessment roll for said improvement, to prepare and file in the.....Court of .....County, Illinois, in the name of this city, a supplemental petition, setting up the passage of this ordinance, and attaching a certified copy thereof, which said petition shall contain a prayer that said Court enter its order dividing the assessment herein into.....installments in the manner herein and by statute provided, and that said Court confirm said assessment so divided into installments, as is by law required.

SEC. 4. This ordinance shall be in full force and effect from and after its passage and approval.

NOTE:—When the original ordinance does not embrace these matters, this supplementary ordinance may be passed.

## FORM NO. 28

### ORDINANCE PROVIDING THAT ENTIRE COST OF IMPROVEMENT BE RAISED BY SPECIAL ASSESSMENT ON PROPERTY BENEFITED, TO THE EXTENT OF THE BENEFITS

(Proceed as in Sec. 3, Ordinance No. 23.)

NOTE:—This form is especially recommended, since it is more flexible than any of the others and allows a wider latitude to the officer in spreading the assessments.

Practically every basis for estimating benefits and spreading the assessment may be employed or availed of by the officer spreading the assessment and any division of the total cost of the improvement between the public and the property benefited, may be had under this form. At the same time, where topographical or other physical conditions bear exceptionally upon some pieces of property, the assessor is vested with a very desirable discretion, which, if exercised judiciously, will generally produce a more equitable and ratable distribution of the cost of the improvement.

## FORM NO. 29

**ORDINANCE PROVIDING FOR THE PAYMENT OF A PART OF  
THE COST OF THE IMPROVEMENT BY SPECIAL ASSES-  
MENT, AND THAT THE COST OF THE IMPROVEMENT AT  
STREET INTERSECTIONS BE ASSESSED AGAINST THE MU-  
NICIPALITY AS PUBLIC BENEFITS**

(Follow form of Ordinance No. 23, except as to Sec. 3, and insert as follows):

**SEC. 3.** That the cost of the said improvement, including the sum of \$....., being the amount included in the estimate of the said ....., hereto attached, as the cost of making, levying and collecting the assessment herein, and which said sum shall be applied towards the payment of the aforesaid and other costs by law authorized, be paid by special assessment to be levied upon the property specially benefited, in accordance with an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and amendments made thereto; *Provided, however,* that there shall be paid by and assessed against the City of....., as public benefits, an amount equal to the cost of the said improvement, at all street and alley intersections to the width of the said intersecting streets and alleys (or to the width of the roadways of said intersecting streets and alleys).

**NOTE:**—It will be noted that there is quite a difference between the width of "intersecting streets" and width of roadways of the "intersecting streets."

## FORM NO. 30

**ORDINANCE PROVIDING FOR THE PAYMENT OF A PART OF  
THE COST OF THE IMPROVEMENT BY SPECIAL ASSES-  
MENT, AND A CERTAIN PER CENT. TO BE ASSESSED AGAINST  
THE MUNICIPALITY AS PUBLIC BENEFITS**

(Follow form of Ordinance No. 23, except as to Sec. 3, and insert as follows:

**SEC. 3.** That the cost of the said improvement, including the sum of \$....., being the amount included in the estimate of the said ....., hereto attached, as the cost of making, levying and collecting the assessment herein, and which said sum shall be applied toward the payment of the aforesaid and other costs by law authorized, be paid by special assessment to be levied upon the property specially benefited, in accordance with an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and amendments made thereto; *Provided, however,* that there shall be paid by and assessed against

the City of....., as public benefits, an amount equal to .....per cent. of the cost of the said improvement, and the amount included in the estimate of the said ....., hereto attached, as the cost of making, levying and collecting the assessment herein.

### FORM NO. 31

#### ORDINANCE PROVIDING THAT ENTIRE COST OF IMPROVEMENT BE RAISED BY SPECIAL TAXATION ACCORDING TO FRONTAGE

*Be it Ordained by the City Council of the City of.....,  
Illinois:*

(Here follow as in Ordinance No. 23, except as to Sec. 3, and insert as follows):

SEC. 3. That the said improvement herein provided for and the whole cost of said improvement, including the sum of..... Dollars (\$.....), being the amount included in the estimate of the said....., hereto attached, as the cost of making, levying and collecting the assessment herein, be paid by special taxation to be levied upon the property contiguous to and abutting thereon, in the proportion of the frontage of each lot, block, tract or parcel of land and property upon said.....Street, from the.....to the.....and to pay said cost of said improvement and the said cost of making, levying and collecting the assessment aforesaid, a special tax to the amount of said cost of said improvement and said cost of making, levying and collecting the assessment as aforesaid, be and the same is hereby levied upon each lot, block, tract or parcel of land and property contiguous to and abutting thereon, accordingly, in accordance with the act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and amendments since made thereto; and that the said sum of \$.....shall be applied toward the cost of making, levying and collecting such assessment, as provided by said act of said General Assembly and the amendments thereto.

### FORM NO. 32

#### AN ORDINANCE PROVIDING FOR THE PAYMENT OR PART OF THE COST OF THE IMPROVEMENT BY SPECIAL TAXATION ON THE BASIS OF FRONTAGE AND PART BY GENERAL TAX- ATION

(Follow form of Ordinance No. 23, except as to Sec. 3, and insert as follows):

SEC. 3. That the cost of said improvement, except as hereinafter provided, including the sum of \$....., being the amount included

in the estimate of the said....., hereto attached, as the cost of making, levying and collecting the assessment herein, and which said sum shall be applied toward the payment of the aforesaid and other costs by law authorized, be paid by special taxation to be levied upon the property contiguous to and abutting upon said improvement in the proportion that each lot, block, tract and parcel of land and property may front or abut upon said.....Street, from .....to....., and to pay the cost of the said improvement, except as hereinafter provided, and the cost of making, levying and collecting the assessment to be levied upon the property as hereinabove provided, a special tax be and the same is hereby levied upon each lot, block, tract and parcel of land and property contiguous to and abutting upon said improvement, to be spread in the proportion hereinabove stated, in accordance with an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and amendments since made thereto; *Provided, however,* that there shall be paid by and assessed against the City of....., as public benefits, an amount equal to.....per cent. of the total cost of said improvement and the amount included in the estimate, hereto attached, as the cost of making, levying and collecting the assessment as aforesaid.

### FORM NO. 33

#### AN ORDINANCE PROVIDING FOR THE PAYMENT OF PART OF THE COST OF THE IMPROVEMENT BY SPECIAL TAXATION ON THE BASIS OF FRONTAGE, AND THAT STREET AND ALLEY INTERSECTIONS BE PAID BY GENERAL TAXATION

(Follow form of Ordinance No. 23, except as to Sec. 3, and insert as follows):

Sec. 3. That the cost of said improvement, including the sum of \$....., being the amount included in the estimate of the said....., hereto attached, as the cost of making, levy and collecting the assessment herein, and which said sum shall be applied toward the payment of the aforesaid and other costs by law authorized, be paid by special taxation, to be levied upon the property contiguous to and abutting upon said improvement in the proportion that each lot, block, tract or parcel of land and property may front or abut upon the said.....Street, from.....to....., and that an amount equal to the cost of the said improvement at all street and alley intersections to the width of the said intersecting streets and alleys (or to the width of the roadways of said intersecting streets and alleys), be paid by and levied upon said city of....., as public benefits; and to pay the said amount of the cost of the said improvement and the cost of making,

levying and collecting the assessment to be levied upon the property as hereinabove provided, a special tax be and the same is hereby levied upon each lot, block, tract and parcel of land and property, contiguous to and abutting thereon, to be spread in the proportion hereinabove stated, in accordance with an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and amendments thereto.

### FORM NO. 34

#### AN ORDINANCE PROVIDING THAT ASSESSMENT AGAINST PROPERTY SHALL BE DIVIDED INTO INSTALLMENTS

(Follow Form No. 23 to Sec. 4 and insert Sec. 4, as follows):

SEC. 4. That the aggregate amount herein ordered to be assessed against each lot, block, tract and parcel of land herein assessed, shall be divided into.....installments in the manner provided for by the statutes in such cases made and provided, and all installments shall bear interest at the rate of five per cent. per annum, according to law.

### FORM NO. 35

#### ORDINANCE PROVIDING THAT THE ASSESSMENT AGAINST PROPERTY AND MUNICIPALITY BE DIVIDED INTO INSTALLMENTS

(Follow Form No. 23 to Sec. 4 and insert Sec. 4, as follows):

SEC. 4. That the aggregate amount herein ordered to be assessed, and each individual assessment, and also the assessment against the municipality on account of property owned by the municipality, and for public benefits, shall be divided into.....installments in the manner provided for by statute in such cases made and provided for, and each of said installments shall bear interest at the rate of five per cent. per annum, according to law.

### FORM NO. 38

#### PETITION FOR ASSESSMENT TO PAY COST OF STREET IMPROVEMENT

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the.....Term, A. D. 191...

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-



ment of .....  
 .....

*To the Honorable Judge Presiding:*

Your Petitioner, the City of....., respectfully represents that it is a municipal corporation, organized and acting as such, under and by virtue of an Act of the General Assembly of the State of Illinois, entitled "An Act Providing for the Incorporation of Cities and Villages," approved April 10th, 1872, in force July 1st, 1872.

Your Petitioner further shows that heretofore, to-wit: on the..... day of....., 19...., the City Council of the said City of....., passed an ordinance entitled "An Ordinance (here insert title of ordinance)," which was approved by the Mayor of said city on the..... day of....., 19...., and is numbered.....

Your Petitioner attaches to and files with this petition a copy of the said ordinance, certified by the Clerk of said city, under the corporate seal of said city; also a copy of the recommendation of the Board of Local Improvements of said city, of the passage of said ordinance by the City Council of said city; also a copy of the estimate of the cost of the improvement authorized and ordered by said ordinance, approved by the City Council of said city, being the legislative body of said city; said recommendation and said estimate of cost being each certified by the City Clerk of said city under the corporate seal of said city; which said copies of said ordinance, recommendation of said Board of Local Improvements, and said estimate of the cost of said local improvement, authorized and approved in said ordinance, your petitioner attaches to and files with this petition and makes a part thereof, by reference.

Your Petitioner prays that steps may be taken to levy a special assessment for the said improvement, in accordance with the provisions of said ordinance and an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, and amendments thereto.

City of....., Illinois,  
 Petitioner,  
 By.....,  
 Its.....

FORM NO. 39

CITY CLERK'S CERTIFICATE TO ORDINANCE

STATE OF ILLINOIS,  
 County of ..... } ss.  
 City of .....

I, ....., City Clerk of the City of....., Illinois, do hereby certify that as such officer

I am the Clerk of the City Council of said city, the keeper and custodian of its records, files and proceedings, and the keeper and custodian of the books, papers, records, reports and ordinances of said city, and that the foregoing document, entitled "An Ordinance....." is a true and correct copy of the original ordinance passed by the City Council of said City of....., Illinois, at its regular meeting held on....., 19...., and approved by the Mayor of said city on....., 19...., as said original ordinance appears on file in my said office, and as the same appears recorded in the Book of Ordinances therein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the corporate seal of the said City of....., Illinois, this .....day of....., A. D. 19....

(Seal.)

.....,  
City Clerk of City of....., Ill.

## FORM NO. 40

### CITY CLERK'S CERTIFICATE TO RECOMMENDATION OF BOARD OF LOCAL IMPROVEMENTS

STATE OF ILLINOIS,  
County of ..... }  
City of ..... } ss.

I, ....., City Clerk of the City of ....., Illinois, do hereby certify that, as such officer, I am the Clerk of the City Council of said city, the keeper and custodian of its records, files and proceedings, and the custodian and keeper of the books, papers, records and reports of said city, and that the foregoing document, headed ".....," is a true and correct copy of the recommendation of the passage of an ordinance for the local improvement of.....Street, in said city, from the ..... to ....., as transmitted by the Board of Local Improvements of said city, under date of ....., 19...., to the said City Council and received, acted upon and approved by said City Council at a regular meeting thereof, held on....., 19...., as the same appears on file in my said office, and in the records of said City Council.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the corporate seal of the said City of....., Illinois, this .....day of....., A. D. 19....

(Seal.)

.....,  
City Clerk of....., Ill.

FORM NO. 41

CITY CLERK'S CERTIFICATE TO THE ESTIMATE OF COST  
OF .....IMPROVEMENT

STATE OF ILLINOIS,  
County of ..... } ss.  
City of .....

I, ....., City Clerk of the City of  
....., Illinois, do hereby certify that, as such officer,  
I am the Clerk of the City Council of said city, the keeper and custodian  
of its records, files and proceedings, and the custodian and keeper of the  
books, papers, records, reports, etc., of said city, and that the foregoing  
document, headed ".....," is a true and correct  
copy of the estimate of the cost of the local improvement of.....  
.....Street, in said city, from.....to  
....., over the signature of the.....  
of the Board of Local Improvements of said city, as forwarded by said  
Board under date of....., 19...., to the said City Council,  
and received, acted upon and approved by said City Council at a regular  
meeting thereof, held on the.....day of.....,  
19...., as the same appears in the records of said City Council, and on  
file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the  
corporate seal of the said City of....., Illinois, this  
.....day of....., A. D. 19....

(Seal.) .....  
City Clerk of the City of....., Ill.

FORM NO. 42

SHORT AND SINGLE CERTIFICATE FOR ALL DOCUMENTS FILED

STATE OF ILLINOIS,  
County of ..... } ss.  
City of .....

I, ....., City Clerk of the City of  
....., Illinois, do hereby certify that the foregoing ordi-  
nance is a true and correct copy of an ordinance adopted and passed by  
the City Council of the City of....., at a regular meeting  
of said City Council, held on the.....day of.....,  
A. D. 19...., and that the same was signed and approved by the Mayor  
of said city on the.....day of..... 19....

I do further certify that the foregoing recommendation of the Board of Local Improvements of said City of....., is a true and correct copy of the same as presented to, and approved by the said City Council, and as attached to and approved in and by said ordinance passed as aforesaid.

I do further certify that the foregoing estimate of the..... of the said Board of Local Improvements is a true and correct copy of the estimate of the cost of the same, as presented to and approved by the said City Council and as attached to and approved in and by said ordinance, passed as aforesaid.

I do further certify that the originals, of which the foregoing are true and correct copies, are intrusted to me as Clerk of said city, for my safekeeping, and that I am the lawful keeper and custodian of the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the corporate seal of said corporation, this.....day of....., 19....

(Seal.)

.....,  
City Clerk of....., Ill.

## FORM NO. 43

### CITY CLERK'S CERTIFICATE TO ORDINANCE

(Which became effective without Mayor's approval.)

STATE OF ILLINOIS,  
County of ..... } ss.  
City of ..... }

I, ....., City Clerk of the City of ....., Illinois, do hereby certify that, as such officer, I am the Clerk of the City Council of said city, the keeper and custodian of its records, files and proceedings, and the custodian and keeper of the books, papers, records, reports and ordinances of said city; and that the foregoing document, entitled: "An Ordinance.....," is a true and correct copy of the original ordinance passed by the City Council of said City of....., at its regular meeting, held on....., 19...., and deposited in my office on the .....day of....., 19...., as said original ordinance appears on file in my said office, and as the same appears recorded in the book of ordinances therein.

I do further certify that said ordinance, before the same took effect and immediately after its passage by the said City Council, was deposited in my office, and that the Mayor of said city did not sign the same, nor return the same to the said City Council with his objections thereto, if any, in writing, at the next regular meeting of the said City Council, occurring not less than five days after the passage of said ordinance as

aforesaid, whereupon the said ordinance took effect in like manner as if he had approved the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the corporate seal of....., Illinois, this.....day of....., 19....

(Seal.)

.....,  
City Clerk of....., Ill.

## FORM NO. 44

### APPOINTMENT OF PERSON TO MAKE ASSESSMENT

Office of Board of Local Improvements

*To the Board of Local Improvements, City of....., Ill.:*

Gentlemen:—By authority in me vested by an act of the General Assembly of the State of Illinois, entitled “An Act Concerning Local Improvements,” approved June 14th, 1897, and amendments thereto, I hereby appoint....., as a competent person to make a true and impartial assessment of the cost of the local improvement of.....Street, in the City of....., from the.....Street to the.....Street, upon municipality and the property benefited by such improvement, in accordance with the ordinance providing for, authorizing and ordering said improvement, passed by the City Council of the City of....., on....., 19...., and approved by the Mayor thereof on....., 19...., and the said Act of the General Assembly, and amendments thereto.

.....,  
President of the Board of Local Improvements, City of.....

## FORM NO. 45

### OATH OF OFFICE OF OFFICER APPOINTED TO MAKE ASSESSMENT

*For Cost of.....Street*

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,

To the.....Term, A. D. 191...

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improvement of .....  
.....

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Illinois, that I will faithfully discharge the duties of my office in making a true and impartial assessment of the costs of the local improvement of.....  
 Street, in the City of.....State of Illinois, from the  
 .....line of.....Street to the.....  
 line of.....Street, upon the City of.....  
 ....., Illinois, the petitioning municipality, and the property benefited  
 by said improvement, in manner provided by law and according to the  
 best of my ability.

SUBSCRIBED and sworn to before me this.....day of.....  
 ....., 19....

.....,  
 Notary Public.

## FORM NO. 46

### PETITION FOR CONDEMNATION AND ASSESSMENT

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,

To the.....Term, A. D. 191...

In the Matter of the Petition of the City of....., Illinois,  
 to Ascertain Compensation, and Levy a Special Assessment to Pay the  
 Cost of the Local Improvement of.....

*To the Honorable Judge Presiding:*

Your Petitioner, ....., in the County of.....  
 ..... and State of....., respectfully represents that it is a municipal corporation organized and acting as such under and by virtue of an Act of the General Assembly of the State of Illinois, entitled "An Act Providing for the Incorporation of Cities and Villages," approved April 10th, 1872; in force July 1st, 1872.

Your Petitioner further represents that heretofore, to-wit: on the  
 .....day of....., 19...., the City Council of the  
 said City of....., Illinois, passed an ordinance, entitled  
 "An Ordinance.....," which was approved  
 by the Mayor of said city on the.....day of.....,  
 19...., and is numbered..... That said ordinance provides that  
 (here describe improvement sufficiently to identify it).

That the following described lots, blocks, tracts and parcels of land shall be taken for said improvement, to-wit: (here set out). That the following described lots, blocks, tracts and parcels of land will be damaged by the construction of said improvement, to-wit: (here set out).

Your Petitioner attaches to and files with this petition a copy of the said ordinance, certified by the Clerk of said City of....., under the corporate seal of said city; also a copy of the recommendation of the Board of Local Improvements of said city of the passage of said ordinance by the City Council of said city; also a copy of the estimate of the cost of the improvement authorized and ordered by said ordinance, as approved by the City Council of said City of....., being the legislative body thereof, said recommendation and said estimate of cost being each certified by the City Clerk of said City of....., under the corporate seal of said city; which said copies of said ordinance, recommendation of said Board of Local Improvements and said estimate of the cost of the said local improvement, your Petitioner attaches to and files with this petition, and makes a part thereof by reference.

Your Petitioner prays that steps be taken to ascertain the just compensation to be made for private property to be taken or damaged for the improvement specified in said ordinance, and to ascertain what property will be benefited by said improvement, and the amount of such benefit, in accordance with the provisions of said ordinance and the statutes in such cases made and provided.

City of....., Petitioner,  
By.....its.....

## FORM NO. 47

### ORDER OF COURT TO BE ENTERED UPON PRESENTATION OF PETITION FOR CONDEMNATION

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the.....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Ascertain the Compensation for Private Property to be Taken or  
Damaged by the Local Improvement of.....,  
What Property will be Benefited by Such Improvement and the Amount  
Thereof.

The City of....., having this day filed its petition herein, praying, among other things, that steps may be taken to ascertain the just compensation to be made for private property to be taken or damaged and to ascertain what property will be benefited by the improvement contemplated herein, and the amount of such benefits, it is ordered and adjudged by the Court that.....and....., being two competent persons, be and they are hereby designated and appointed Commissioners in this behalf, to act with (Superintendent of Special Assessments or President of the Board

of Local Improvements, as the case may be) of the City of.....  
 ....., who shall investigate and report to the Court the just compensation to be made to the respective owners of private property, which will be taken or damaged for the improvement herein, and also what property will be benefited by such improvement, and the amount of such benefits to each parcel, and to do all things as may be by law required.

It is further ordered and adjudged by the Court that there shall be allowed to said two Commissioners the sum of \$.....each, as a just and proper fee for their services in this behalf, which said sum shall be taxed as costs and included in the amount to be assessed herein.

## FORM NO. 48

## OATH OF COMMISSIONERS

STATE OF ILLINOIS,  
 County of ..... } ss.

In the.....Court,  
 To the.....Term, A. D. 19....

In the Matter of the Petition, Etc., .....  
 .....  
 .....

We, the undersigned, Commissioners appointed by the.....  
 Court of.....County, to investigate and report to the  
 Court the just compensation to be made to the respective owners of private property, which shall be taken or damaged for the improvement involved in the above entitled cause, and also what real estate will be benefited by such improvement, and the amount of such benefit to each parcel, do solemnly swear that we will support the Constitution of the United States and the Constitution of the State of Illinois, and will faithfully discharge the duties of our office, by well and truly investigating and reporting to the Court the just compensation to be made to the respective owners of private property, which will be taken or damaged for said improvement and what real estate will be benefited by such improvement and the amount of such benefit to each parcel, and perform all such other duties as may be by law required in such cases to the best of our ability.

.....,  
 .....  
 Commissioners.

SUBSCRIBED and sworn to before me this.....day of.....  
 ....., 19....

(Seal.)

Notary Public.



FORM NO. 49

NOTICE OF PASSAGE OF ORDINANCE TO BE SENT TO  
TAXPAYERS AND OCCUPANTS

....., Ill., ..... 19....,

To.....

At a meeting of the City Council of the City of.....,  
Illinois, held on the.....day of....., A. D. 19....,  
an ordinance was passed, which was approved by the Mayor of said  
city on the.....day of....., A. D. 19...., said  
ordinance being entitled "An Ordinance.....  
.....," and which said ordinance provides for the improvement of  
.....

You are hereby notified of the passage of said ordinance, and that in  
pursuance thereof, a petition will be filed in the.....  
Court of.....County, Illinois, praying that steps may  
be taken to levy a special assessment for the said improvement according  
to law and the provisions of said ordinance.

.....,  
Clerk of the City of....., Ill.

NOTE:—See Section 34, Act of 1897—Sidewalks.

FORM NO. 50

AFFIDAVIT OF MAILING NOTICES OF PASSAGE OF  
ORDINANCE

STATE OF ILLINOIS, ..... }  
County of ..... } ss.

In the.....Court,  
To the.....Term, A. D. 191...

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

....., being first duly sworn, on oath says  
that at the request and under the direction of the Board of Local Im-  
provements of the City of....., Illinois, he made a  
careful examination of the books of the Collector of.....,  
showing payment of the taxes for the preceding year on the lots, blocks,  
tracts and parcels of land fronting upon the proposed improvement of  
....., referred to in the petition in the above  
entitled cause, and that to each of the persons he thus found paying the

said taxes, and also to the occupant of each lot, block, tract or parcel of land fronting on said proposed improvement, actually occupied, as ascertained by him upon diligent search and examination, he sent, post-paid, on the.....day of....., 19...., a notice of the passage of said ordinance, a substantial copy of which said notice being as follows, to-wit:

(Here insert copy of notice.)

Dated....., Illinois, ..... , A. D. 19.....

NOTE:—See Section 34, Act of 1897.

## FORM NO. 51

### ORDER OF COURT ON PRESENTATION OF PETITION FOR SPECIAL ASSESSMENT

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the.....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

And now comes the Petitioner in the above entitled cause, by.....  
....., its....., and presents to the Court its petition  
herein, together with the exhibits thereto, praying that steps may be  
taken to levy a special assessment to pay the cost of the improvement  
therein mentioned.

It is ordered by the Court that the said petition, together with the  
exhibits thereto, be and the same are hereby ordered filed in this cause,  
and that.....being a competent person, ap-  
pointed by the President of the Board of Local Improvements of the  
said city, be and he is hereby ordered and directed to make a true and  
impartial assessment of the cost of the said improvement upon the City  
of....., and the property specially benefited by such  
improvement, in manner directed by said ordinance and as required by  
law, and when completed, to return the same to this Court.

Approved: ....., Judge.

NOTE:—The entry of such an order is not prescribed. It may be found  
rather advisable.

## FORM NO. 52

## REPORT—ASSESSMENT ROLL.

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,  
To the.....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

Report and assessment roll, made by.....,  
duly and properly appointed and qualified according to law to make a  
true and impartial assessment of the cost of the local improvement of  
.....in said City of.....,  
Illinois, in accordance with the ordinance recommended by the Board  
of Local Improvements of said city, and the estimate of the cost thereof,  
which said ordinance was passed and said estimate approved by the City  
Council of the said city, at a meeting thereof held on the.....  
day of....., A. D. 19...., and said ordinance approved  
by the Mayor of said city on the.....day of.....,  
A. D. 19...., said ordinance being entitled "An Ordinance.....  
.....," and recited in the petition of said city in the  
above entitled cause, filed in said Court on the.....day of.....  
....., A. D. 19....; the said report and assessment roll showing  
the assessment of the cost of the said improvement upon the said City  
of....., and upon all the property specially benefited by  
said improvement, together with a list of all the lots, blocks, tracts and  
parcels of land assessed for said improvement, the amount assessed against  
each, the name of the person who paid the taxes on each such parcel  
during the last preceding calendar year in which taxes were paid, the  
residence of the person so paying the taxes on each such parcel so far  
as the same can be found upon diligent inquiry, and the amount of each  
assessment, as follows:

(Here follows assessment roll.)

All of which is respectfully submitted.

.....,  
Appointed to make said assessment.

## FORM NO. 53

## REPORT AND ASSESSMENT ROLL—INSTALLMENTS.

Name of person who paid taxes during last preced- ing calendar year in which taxes were paid.	Residence	Property specially benefited			1st Installment		Second Install- ment, Mo.	Total Assessments	
		Pt. of Lot or Land	Lot	Block	Dollars	Cents		Dollars	Cents
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

In this form the installments may be extended across the page by adding a number of columns equal to the number of installments.

FORM NO. 54

ANOTHER FORM OF REPORT AND ASSESSMENT ROLL—  
INSTALLMENTS

Name and Residence of Person who paid the taxes and the calendar year in which taxes were paid.	Part of Lot or Land.	Lot	Block	Installment No.	Assessment	
					Dollars	Cents
				1		
				2		
				3		
				4		
				5		
				Total		
				1		
				2		
				3		
				4		
				5		
				Total		

## FORM NO. 55

AFFIDAVIT AND CERTIFICATE OF ASSESSOR—ASSESSMENT  
ROLL

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,  
To the.....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

This affiant, ....., being duly sworn,  
on oath states and certifies that he was duly appointed by the President  
of the Board of Local Improvements of the City of.....,  
Illinois, to make a true and impartial assessment of the cost of the im-  
provement of....., in the said City of  
....., Illinois, in accordance with the ordinance recom-  
mended by the Board of Local Improvements of said city and the estimate  
of the cost thereof, which said ordinance was passed and said estimate  
approved by the City Council of said city, at a meeting thereof, held  
on the.....day of....., 19...., and said ordi-  
nance approved by the Mayor of said city on the.....day of  
....., 19...., and entitled "An Ordinance.....  
.....," recited in the petition of said city, in the above  
entitled cause, filed in said Court on the.....day of.....  
....., 19....

Affiant further on oath states that he took the oath of office required  
by law before entering upon his said duties, and that he has completed  
for the foregoing assessment roll; that the same contains a list of all the  
lots, blocks, tracts and parcels of land assessed for the proposed im-  
provement, the amount assessed against each, the name of the person  
who paid the taxes on each such parcel during the last preceding calendar  
year in which taxes were paid, as ascertained upon a careful investigation  
made by him; the residence of the person so paying the taxes on each  
such parcel, so far as the same could be found upon diligent inquiry;  
and the amount of each installment of such assessment, in accordance  
with the statutes in such cases made and provided and the ordinance of  
the said city of.....

Affiant further says that he did investigate the district which will  
be benefited by said proposed improvement, before making such appor-  
tionment and assessment, and reports the same, and the boundaries thereof,  
to be as follows:

(When improvement is the construction of a sewer, describe district  
by boundaries.)

Affiant further says that he made a careful examination of the books of the Collector of....., showing the payments of general taxes during the last preceding year in which taxes were paid, to ascertain the person or persons who last paid the taxes on said respective parcels, lots, blocks and tracts of land and property assessed and described in said foregoing assessment roll and report, and also has made diligent search and inquiry for their residences; and that the said assessment roll and report correctly states the names of said person or persons and their residences as so ascertained by this affiant.

Affiant further says that he did estimate what proportion of the total cost of said improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and did apportion the same between the City of....., Illinois, and such property so that each shall bear its relative equitable proportion; that the amounts assessed against the public and each parcel of property are just and equitable and do not exceed the benefits which will in each case be derived from said improvement, and that no lot, block, tract or parcel of land or property has been assessed more than its proportionate share of the cost of said improvement; that the amount so estimated and apportioned to the said City of....., Illinois, as public benefits, is the sum of \$....., and the amount so estimated and apportioned to the property to be benefited is the sum of \$.....; and having found said amounts, he did apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land and property in the proportion in which they will be severally benefited by said improvement, all in accordance with the statute in such cases made and provided, and the said ordinance of the said City of....., Illinois.

.....,  
Appointed to make said assessment.

SUBSCRIBED and sworn to before me this.....day of.....  
....., 19....

.....,  
Notary Public.

NOTE:—This form embraces all that is required under Section 41 of the Act of 1897.

This affidavit should be appended to the assessment roll and report.

The matters embraced in this affidavit are not infrequently divided into three separate documents, the first being a "certificate of the assessor" attached to the report and assessment roll; the second a "certificate under oath," and the third "an affidavit" as mentioned in Section 41.

They are all so closely associated with the performance of a particular duty by the same individual that it seems rather useless to make a division of the facts certified and sworn to in each. We shall, however, in the following three forms, show the division frequently made.

## FORM NO. 56

## CERTIFICATE OF ASSESSMENT, ETC.

STATE OF ILLINOIS,  
County of ..... } ss.

In the..... Court,

To the..... Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....

The undersigned hereby certifies that he was duly appointed by the President of the Board of Local Improvements of the City of....., Illinois, to make a true and impartial assessment of the cost of the improvement of....., in the said City of....., Illinois, in accordance with the ordinance recommended by the Board of Local Improvements of said city, and the estimate of the cost thereof submitted to the City Council of said city by the Board of Local Improvements of said city, upon the City of....., Illinois, and the property benefited thereby; that he took the oath of office required by law before entering upon his said duties, and that he has completed the foregoing assessment roll; that the same contains a list of all the lots, blocks, tracts and parcels of land assessed for the proposed improvement, the amount assessed against each, the name of the person who paid the taxes on each such parcel during the last preceding calendar year in which the taxes were paid, as ascertained upon careful investigation made by him; the residence of the person so paying the taxes on each such parcel, so far as the same can, upon diligent inquiry, be found, and the amount of each installment of such assessment, in accordance with the statute in such cases made and provided and the said ordinance of said City of..... That he did investigate the district which will be benefited by said proposed improvement, before making such apportionment and assessment, and reports the same, and the boundaries thereof, to be as follows:

(When the improvement is for the construction of a sewer, describe district by boundaries.)

That he did estimate what proportion of the total cost of said improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and did apportion the same between the City of....., Illinois, and such property so that each shall bear its relative equitable proportion; that the amount so estimated and apportioned to the said City of....., Illinois, as public benefits, is the sum of \$.....; and the amount



so estimated and apportioned to the property to be benefited, is the sum of \$.....; and having found said amounts, he did apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land and property in the proportion in which they will be severally benefited by said improvement, in accordance with the statutes in such cases made and provided, and the said ordinances of the said City of....., Illinois.

.....,

Appointed to make said assessment.

SUBSCRIBED and sworn to before me this.....day of.....  
....., A. D. 19....

.....,

Notary Public.

## FORM NO. 57

### CERTIFICATE OF ASSESSOR UNDER OATH—ASSESSMENT ROLL

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,  
To the ..... Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Improvement of  
.....  
.....

This affiant, being duly sworn, on oath states that he has made a true and impartial assessment of the cost of the improvement herein upon the City of....., and the property benefited by such improvement; that he verily believes that the amounts assessed against the City of....., Illinois, for public benefits, and against each parcel of property assessed in the assessment roll by him made, in pursuance thereof, and attached hereto, are just and equitable and do not exceed the benefits which will in each case be derived from said improvement; and that no lot, block, tract or parcel of land or property has been assessed in said assessment for said improvement more than its proportionate share of the cost of the said improvement.

.....,

Appointed to make said assessment.

SUBSCRIBED and sworn to before me this.....day of.....  
....., 19....

.....,

Notary Public.

## FORM NO. 58

**AFFIDAVIT OF COMPLIANCE WITH SECTION 41 OF THE ACT  
OF 1897, WHEN MADE BY SOME ONE  
ACTING UNDER DIRECTION**

STATE OF ILLINOIS,  
County of ..... } ss.

In the ..... Court,  
To the ..... Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Improvement  
of .....

This affiant, being first duly sworn, on oath states that at the request and under the direction of....., who was appointed by the President of the Board of Local Improvements of the City of....., Illinois, to make said assessment, he made a careful examination of the books of the Collector of....., showing payments of general taxes during the last preceding year in which taxes were paid, to ascertain the person or persons who last paid the taxes on the respective lots, blocks, tracts and parcels of land and property assessed and described in the assessment roll and report filed herein, and that he has made a diligent search and inquiry for their residence; that said assessment roll and report correctly states the names of such person or persons and their residences as so ascertained by this affiant.

SUBSCRIBED and sworn to before me this.....day of.....  
....., 19....

.....,  
Notary Public.

NOTE:—Where the assessor personally has made this examination and investigation, the above matters may be added to the affidavit of mailing notices, and reference is made to that affidavit in this work.

## FORM NO. 59

**SPECIAL ASSESSMENT NOTICE—INSTALLMENTS—PUBLISHING  
AND POSTING.**

NOTICE IS HEREBY GIVEN to all persons interested, that the City Council of....., Illinois, having ordered that (here insert brief description of the nature of the improvement), the ordinance for the

same being on file in the office of the City Clerk of said city, having applied to the.....Court of.....County, Illinois, for an assessment of the cost of said improvement according to benefits, said assessment being payable in.....installments, each bearing interest at the rate of five per cent. per annum, and an assessment therefor having been made and returned to said Court, the final hearing thereon will be had on the.....day of.....A. D. 19...., at the hour of.....o'clock.....M., or as soon thereafter as the business of the Court will permit.

All persons desiring, may file objections in said Court, before said day, and may appear on the hearing and make their defense.

Dated....., Illinois, ....., 19....

.....,

Appointed to make said assessment.

## FORM NO. 60

### SPECIAL ASSESSMENT NOTICE—NO INSTALLMENTS— PUBLISHING AND POSTING.

NOTICE IS HEREBY GIVEN to all persons interested, that the City Council of....., Illinois, having ordered that (here insert brief description of the nature of the improvement), the ordinance for the same being on file in the office of the City Clerk of said city, having applied to the.....Court of.....County, Illinois, for an assessment of the cost of said improvement according to benefits, and an assessment therefor having been made and returned to said Court, the final hearing thereon will be had on the.....day of.....A. D. 19...., at the hour of.....o'clock.....M., or as soon thereafter as the business of the Court will permit.

All persons desiring, may file objections in said Court, before said day, and may appear on the hearing and make their defense.

Dated....., Illinois, ....., 19....

.....,

Appointed to make said assessment.

## FORM NO. 61

### NOTICE OF HEARING—CONFIRMATION—MAILING.

Mr. ....

You are hereby notified that on....., 19...., the City of....., Illinois, filed a petition in the.....

Court of.....County, Illinois, praying that steps be taken to levy a special assessment for the local improvement of.....  
 .....Street, from.....to.....  
 ....., by (here briefly describe nature of improvement), in accordance with the provisions of the ordinance providing for said improvement; the total cost of said improvement being the sum of \$.....; and the total amount assessed as benefits upon the public therein being the sum of \$.....; which said proceeding is now pending.

That an assessment roll was filed in said proceedings in the said Court on the.....day of....., 19...., said assessment being payable in.....installments, each bearing interest at the rate of five per cent. per annum.

Your property is assessed therein as follows:

.....(here insert description) \$.....(here amount)  
 .....(here insert description) \$.....(here amount)

Application for the confirmation of said assessment will be made in the said Court, to be held in its Court room in the Court House in the City of....., Illinois, on the.....day of....., 19...., at.....o'clock.....M., or as soon thereafter as the business of the Court will permit.

All persons desiring, may file objections in said Court before the day lastly above mentioned, and may appear on the hearing and make their defense.

Dated....., Illinois, ....., 19....

.....,  
 Appointed to make said assessment.

## FORM NO. 62

### AFFIDAVIT OF POSTING NOTICES OF FINAL HEARING

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court thereof.

In the Matter of the Petition of the City of....., Illinois, to Levy a Special Assessment to Pay the Cost of the Local Improvement of .....

This affiant, ....., being duly sworn, upon oath says, that on the.....day of....., A. D. 19...., he posted notices, of which the following is a copy, to-wit:

(Attach notice here.)

As follows, to-wit: By securely affixing the same, one to the.....

..... Street;  
 one to the..... Street;  
 one to the..... Street;  
 one to the..... Street;  
 one to the..... Street.

Each of the said four places are in the neighborhood of said improvement, and are public places in the said City of ....., Illinois.

.....,  
 SUBSCRIBED and sworn to before me this.....day of.....  
 ....., 19....

.....,  
 Notary Public.

# FORM NO. 63

## CERTIFICATE OF PUBLICATION

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court.

In the Matter of the Petition of the City of.....,  
 Illinois, to Levy a Special Assessment to pay the Cost of the Local  
 Improvement of .....  
 .....

....., a corporation, does hereby certify  
 that it is the publisher of the .....,  
 a secular newspaper of general circulation, printed and published weekly  
 in the City of ....., in the County and  
 State aforesaid; that the advertisement, of which the annexed is a true  
 copy, has been published in said newspaper regularly for two successive  
 weeks, at least once in each week, the first insertion of which was con-  
 tained in the paper published on the ..... day of .....,  
 19...., and the last insertion of which was contained in the paper pub-  
 lished on the ..... day of ....., 19....; that said news-  
 paper has been regularly published in said city for at least six months  
 prior to the date of the first publication of said notice.

Dated, this..... day of ....., A. D. 19....

.....,  
 Publisher.

By .....  
 Its .....

## FORM NO. 63A

## CERTIFICATE OF PUBLICATION

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the ..... Court.

In the Matter of the Petition of the City of .....  
 Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
 Improvement of .....

The undersigned does hereby certify that he is the publisher of the  
 ....., a secular newspaper  
 of general circulation, printed and published daily in the City of  
 ....., in the County and State afore-  
 said; that the advertisement, of which the annexed is a true copy, has  
 been published in said newspaper regularly for five successive days, the  
 first insertion of which was contained in the paper published on the  
 ..... day of ..... 19...., and the last insertion of which  
 was contained in the paper published on the ..... day of .....  
 19....; that said newspaper has been regularly published in said City for  
 at least six months prior to the date of the first publication of said notice.

Dated, this ..... day of ....., A. D. 19....

.....,  
 Publisher.

## FORM NO. 64

AFFIDAVIT OF MAILING NOTICE OF FINAL HEARING FOR  
 CONFIRMATION OF ASSESSMENT

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the ..... Court.

To the ..... Term, A. D. 19....

In the Matter of the Petition of the City of .....  
 Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
 Improvement of .....

This affiant, ....., appointed by the  
 President of the Board of Local Improvements of the City of  
 ....., Illinois, to make the assess-  
 ment, to pay the cost of the proposed improvement contemplated in the



assessment of the cost of the improvement of .....  
 in said City of....., Illinois, as contemplated  
 in the petition in the above entitled cause; that he made a careful exam-  
 ination of the books of the Collector of ....., showing the  
 payments of general taxes during the last preceding year in which taxes  
 were paid, to ascertain the person or persons who last paid the taxes on  
 said respective parcels, lots, blocks and tracts of land and property  
 assessed and described in the assessment roll and report filed herein, and  
 also has made diligent search and inquiry for their residences, and that  
 said assessment roll and report correctly states the names of said person  
 or persons and their residences, as so ascertained by this affiant.

Affiant further says that he sent by mail, prepaying the postage thereon,  
 on the.....day of.....A. D. 19...., to each of the said  
 persons paying the taxes on the respective lots, blocks, tracts and parcels  
 of land and property assessed for the proposed improvement aforesaid,  
 during the last preceding year in which taxes were paid, addressed to such  
 person at his residence, as shown in the assessment roll filed herein, or if  
 such residence is not shown therein, then to such person so paying the  
 taxes, directed generally to the City of.....,  
 Illinois, a notice of which the following is substantially a copy:

(Here copy notice.)

Dated ....., Illinois, 19....

.....,  
 Appointed to make said assessment.

SUBSCRIBED and sworn to before me this.....day of.....  
 ....., 19....

.....,  
 Notary Public.

## FORM NO. 66

### COMMISSIONERS' REPORT AND ASSESSMENT ROLL— CONDEMNATION

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court.  
 To the .....Term, A. D. 19....

In the Matter of the Petition of the City of .....,  
 Illinois, to Ascertain the Compensation for Private Property to be  
 Taken or Damaged by the Local Improvement of.....  
 .....  
 what Property will be Benefited by such Improvement, and the Amount  
 Thereof.



Report made by the Commissioners appointed by the.....  
 Court of.....County, Illinois, to investigate and  
 report to the said Court the just compensation to be made to the respective  
 owners of private property which will be taken or damaged for the local  
 improvement of .....  
 in said city, in accordance with the ordinance recommended by the Board  
 of Local Improvements of said city and the estimate of the cost of the  
 same, which said ordinance was passed and said estimate approved by the  
 City Council of said city at a meeting thereof, held on the.....day of  
 ....., 19...., said ordinance having been approved by the....  
 Mayor of said city, and being entitled "An Ordinance.....  
 ....., " and recited in the petition of said  
 City of.....to the said Court, filed in said  
 Court on the.....day of ....., 19...., and also to investi-  
 gate and report what real estate will be benefited by the improvement  
 aforesaid, and the amount of such benefits to each parcel of land, in and  
 by which said report, said Commissioners described and respective parcels  
 of property to be taken or damaged for such improvement, the names  
 of the respective owners of record of said parcels of land, and the residence  
 of each such owner, the name and residence of the occupant of each of  
 said parcels of property, where the property is occupied, so far as known  
 to said Commissioners, or can be found upon diligent inquiry; also the  
 amount of the value of each piece or parcel of property to be taken for  
 said improvement, and the amount of damages (if any) which, in their  
 opinion, will result to any piece or parcel of land not taken by reason  
 of said improvement, with a description of each piece or parcel so dam-  
 aged; also an estimate and report of what proportion of the total cost  
 of said improvement (including therein their estimate of value and dam-  
 age and the estimate of cost) will be of benefit to the public, and what  
 proportion thereof will be of benefit to the property, together with an  
 apportionment of the same between the said City of.....  
 and such property, so that each shall bear its relative equitable propor-  
 tion. Also what lots, blocks, tracts and parcels of land with accurate  
 description of each of the same; and also an apportionment and assessment  
 of the amounts found to be of benefit to the property upon the said  
 several lots, blocks, tracts and parcels of land in the proportion in which  
 they will be severally benefited by said improvements, as follows:

(Here follows assessment roll.)

All of which is respectfully submitted.

.....,  
 .....  
 .....

Commissioners appointed by the.....Court of  
 .....County, Illinois.

## FORM NO. 67

**CONDEMNATION—SECTION OF COMMISSIONERS' REPORT  
AND ASSESSMENT ROLL**

Schedule of Ownership and Schedule of Residence	Name and resi- dence of oc- cupant.	Property to be taken or damaged.			Value of Property to be taken		Damage to Prop- erty not taken	
		Part of Lot	Lot	Block	Dollars	Cents	Dollars	Cents
.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....

**NOTE:**—This may be used in connection with roll assessing benefits.

**COMMISSIONERS' CERTIFICATE IN CONDEMNATION  
PROCEEDINGS**

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....  
In the Matter of the Petition of the City of.....,  
Illinois, to Ascertain the Compensation for Private Property to be  
Taken or Damaged by the Local Improvement of.....  
.....  
.....  
what Property will be Benefited by such Improvement, and the Amount  
Thereof.

These affiants, .....  
 .....  
 being each first duly sworn, on oath say that they are the Commissioners who made the foregoing attached report; that they have carefully examined the questions referred to in the said report, and that in their opinion the amounts awarded for damages and value therein, the assessment district therein shown, and the respective amounts assessed against the private property therein, and also the apportionment of the cost of said improvement between the public and the private property assessed (and the allowance for property theretofore dedicated), are correct, equitable and just.

Commissioners appointed by the.....Court of  
.....County, Illinois.

SUBSCRIBED and sworn to before me this.....day of.....  
..... 19....

**Notary Public.**

## AFFIDAVIT OF OWNERSHIP—CONDEMNATION

STATE OF ILLINOIS,  
County of .....

In the.....Court,  
To the .....Term, A. D. 19....  
In the Matter of the Petition of the City of.....  
Illinois, to Ascertain the Compensation for Private Property to be

Taken or Damaged for the Local Improvement of.....  
 .....  
 what Property will be Benefited by such Improvement, and the Amount  
 Thereof.

....., being first duly sworn, on oath  
 says that he is the President of the Board of Local Improvements of the  
 City of ..... (or an employee of the office  
 of the President of the Board of Local Improvements), and that, as such,  
 he has carefully examined the records in the Recorder's office of said  
 .....County, for the names of the owners of  
 record of the several lots, blocks, tracts and parcels of land to be taken  
 or damaged for the improvement of.....

.....  
 in said City of....., in accordance with the  
 ordinance recommended by the Board of Local Improvements of said city,  
 and the estimate of the cost of the.....,  
 of said Board, submitted to the City Council of said city, which said  
 ordinance was passed and said estimate approved by the said City Council  
 at a meeting thereof, held on the.....day of.....,19....,  
 and said ordinance approved by the Mayor of said city on the.....  
 day of ....., 19...., and entitled "An Ordinance....."  
 ....., and recited in the petition of said city  
 in this cause; and also for the names of the owners of record of the  
 respective lots, blocks, tracts and parcels of land against which benefits  
 are assessed in said report, and that the names of such owners are cor-  
 rectly shown in the column or schedule of ownership in said report.

Affiant further says that he has diligently inquired as to the residence  
 of the respective owners of property to be taken or damaged for said  
 improvement, and as to the residence of the respective owners of all the  
 respective lots, blocks, tracts and parcels of land against which benefits  
 have been assessed in said report, by a careful examination of the files  
 and records of said Recorder's office, and of the return of the Collector's  
 warrant for taxes for the last preceding calendar year, and, also, by visit-  
 ing each of the said parcels of land and inquiring of the occupants of  
 said lands, so far as the same were occupied, and of the occupants of,  
 and residents upon lands in the vicinity of said lands, and of the relatives  
 and friends of said parties where known, and that the residences of the  
 said owners of the said property to be taken or damaged for the said  
 improvement, and of the said owners of all respective lots, blocks, tracts  
 and parcels of land against which benefits have been assessed in said report,  
 are correctly stated according to the result of his said examination and  
 inquiry in the column or schedule of residences in said report.

Affiant further says that in all cases where he has been unable to find  
 the residence of the owner of such record title, he has examined the return  
 of the.....Collector's warrant for taxes on real  
 estate for the preceding year, and has set opposite each such parcel of  
 land, whose owner has not been found, the name of the person who paid  
 the tax on said parcel for the preceding year together with his place of  
 residence, wherever, upon diligent inquiry, he was able to find the same.

Affiant further says that he found that the following-named defendants are non-residents of the State of Illinois, and that the place of residence of each of them is correctly stated opposite their respective names, as follows, to-wit:

<i>Names of Non-Resident Defendants.</i>	<i>Residence of Same.</i>
.....	.....
.....	.....
.....	.....

Affiant further says that the residence of the following-named defendants are unknown and cannot be ascertained, as before stated:

<i>Names of Defendants Whose Residence is Unknown.</i>
.....
.....
.....

This affiant further states that he has visited each of the parcels of land to be taken or damaged for said improvement, described in said report, for the purpose of ascertaining whether or not the same was occupied and the name and residence of the occupant, if any, and made diligent effort to ascertain the same, and that in every case where said parcels of land were, upon such investigation, found to be occupied, the name of the occupant is stated in said report opposite such parcel, together with his residence when ascertained.

.....,  
President of Board of Local Improvements.

SUBSCRIBED and sworn to before me this.....day of.....  
....., 19....

.....,  
Notary Public.

## FORM NO. 70

### ORDER OF COURT FOR PUBLICATION—CONDEMNATION

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,

To the .....Term, A. D. 19....

City of ....., Illinois,

—vs.—

.....  
And all other persons having or  
claiming interest in any of the  
premises designated and de-  
scribed, "All Whom It May Con-  
cern,"

Defendants.

In the Matter of the Petition of the City of.....,  
Illinois, to Ascertain the Compensation for Private Property to be

Taken or Damaged for the Local Improvement of.....  
 .....  
 what Property will be Benefited by such Improvement, and the Amount  
 Thereof.

And now comes the Petitioner herein, and it appearing to the Court  
 from the affidavit of ownership filed herein, that.....  
 .....defendant....in this cause.....  
 non-resident....of the State of Illinois, and that the place of residence  
 of said defendant.....as follows:.....  
 .....

And also that the place of residence of.....  
 .....  
 defendant....herein....., shown by said affidavit to be  
 unknown, and cannot, after due examination, search and inquiry, be ascer-  
 tained, by reason whereof personal service of process cannot be had  
 on....h.....

It is ordered by the Court that the Clerk of this Court cause publi-  
 cation, in the manner required by law, to be made as to the above-named  
 defendants and "All Whom It May Concern," in the.....  
 ....., a newspaper published in the City of.....,  
 Illinois, which is hereby designated for that purpose, in manner and form  
 prescribed by law.

## FORM NO. 71

### NOTICE BY PUBLICATION AND POSTING—CONDEMNATION

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the .....Term, A. D. 19....

City of ....., Illinois,  
 —vs.—

.....  
 And all other persons having or  
 claiming interest in any of the  
 premises designated and de-  
 scribed, "All Whom It May Con-  
 cern,"

Defendants.

In the Matter of the Petition of the City of.....,  
 Illinois, to Ascertain the Compensation for Private Property to be  
 Taken or Damaged for the Local Improvement of.....  
 .....  
 what Property will be Benefited by such Improvement, and the Amount  
 Thereof.

It appearing in the above entitled cause, from the files therein and

the affidavit of ownership, filed therein, on the.....day of.....  
 ....., A. D. 19...., that the defendants (here name non-residents),  
 impleaded with others, above named and made parties defendant in said  
 cause, are non-residents of the State of Illinois; and it appearing also  
 from said files and said affidavit, that the place of residence of (here  
 name defendants whose residences are unknown), defendant.... herein,  
 are shown thereby to be unknown, and cannot, after due and diligent  
 examination, search and inquiry, be ascertained, so that personal service  
 of process can not be had on....h.....; notice is hereby given to said  
 defendants and to the defendants designated as "All Whom It May Con-  
 cern," and to all other persons and parties named in the report and  
 assessment roll of the Commissioners, filed in the above entitled cause  
 in said Court, against whose property benefits have been assessed therein,  
 to pay the cost of the improvement hereinafter described; that on the  
 .....day of ....., 19...., said City of .....  
 filed its petition in the said.....Court of.....  
 County, praying that steps be taken to ascertain the just compensation  
 to be made for private property to be taken or damaged for the improve-  
 ment of.....(here describe), in said city, ordered and provided  
 for in and by an ordinance of said city, entitled "An Ordinance.....  
 .....,," and to ascertain what property will be bene-  
 fitted by such improvement and the amount of such benefit, and to levy  
 a special assessment upon all the property benefited by said improvement,  
 to pay the cost of said improvement, in accordance with the terms and  
 provisions of said ordinance and in manner provided by law; that the sum-  
 mons in said cause is made returnable on the.....day of.....,  
 19....., to said Court, to be held in the Court House in the City of  
 .....County, Illinois, and that the pieces and  
 parcels of property to be taken for said improvement are described as  
 follows, to-wit:

.....  
 .....  
 And that the pieces and parcels of property to be damaged by the making  
 of said improvement are described as follows, to-wit:

.....  
 .....  
 That the total cost of said improvement, as shown by the estimate and  
 report herein, is the sum of \$.....; that a special assessment has  
 been made to raise the cost of the said improvement, and that the report  
 thereof was filed in the office of the Clerk of said.....  
 Court, of the said.....County, in the Court House  
 in the said City of....., County and State afore-  
 said, on the.....day of....., A. D. 19...., and that the  
 proceedings therein are now pending.

You are further hereby notified that summons in the said cause is made  
 returnable to the ..... Term, 19...., of the said  
 .....Court, to be held in the said Court  
 House in the said City of..... on the.....

day of....., A. D. 19...., when and where you may appear  
and defend if you see fit so to do.

Dated....., Illinois, ....., 19....

Clerk of the.....Court of.....County, Illinois.

## FORM NO. 72

### AFFIDAVIT OF MAILING NOTICES TO PARTIES ASSESSED—CONDEMNATION

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

City of ....., Illinois, }

—vs.—

.....  
And all other persons having or  
claiming interest in any of the  
premises designated and de-  
scribed, "All Whom It May Con-  
cern,"

Defendants. }

In the Matter of the Petition of the City of.....,  
Illinois, to Ascertain the Compensation for Private Property to be  
Taken or Damaged for the Local Improvement of.....  
.....,  
what Property will be Benefited by such Improvement, and the Amount  
Thereof.

This affiant, being first duly sworn, upon oath says that he is one of  
the Commissioners appointed by the Court in the above entitled cause;  
that he sent by mail, postpaid, on the.....day of.....,  
A. D. 19...., to each person whose property has been assessed for benefits  
in the assessment roll and report returned by the Commissioners in the  
above proceeding (not being owners of property taken or damaged there-  
for), directed to the address as shown in said report filed herein, or where  
not so shown, then directed generally to the City of.....,  
Illinois, a notice, stating the nature of the said proposed improvement, the  
description of such owner's property assessed therefor, the amount of  
such assessment and the date when the summons in said cause is returnable  
and when objections thereto may be filed, a copy of which said notice is



hereto attached and referred to and made a part of this affidavit by reference.

SUBSCRIBED and sworn to before me this.....day of.....  
....., 19....

Notary Public.

FORM NO. 73

AFFIDAVIT OF MAILING AND POSTING NOTICE TO NON-  
RESIDENT DEFENDANTS—CONDEMNATION

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

City of ....., Illinois,

—vs.—

And all other persons having or  
claiming interest in any of the  
premises designated and de-  
scribed, "All Whom It May Con-  
cern,"

Defendants.

In the Matter of the Petition of the City of.....,  
Illinois, to Ascertain the Compensation for Private Property to be  
Taken or Damaged for the Local Improvement of.....  
.....,  
what Property will be Benefited by such Improvement, and the Amount  
Thereof.

This affiant, being duly sworn, on oath states that on the.....  
day of....., A. D. 19...., being at least fifteen days prior  
to the return day of the summons issued in the above entitled cause, he  
sent by mail, postage prepaid, to each of the following named defendants,  
being defendants named in the report of the Commissioners filed herein,  
and whose residence are shown thereby to be outside the State of Illinois,  
and being their respective places of residence as shown and stated in said  
report, where such residence is stated therein, to-wit:  
To....., addressed to.....  
To....., addressed to.....  
(etc.) And as to each of the following named defendants, to-wit:

.....  
 named in the said report of the Commissioners filed herein, whose residence is not shown therein, or is shown and found thereby, or in the affidavit of ownership filed herein, to be unknown, he sent by mail, postpaid, on the date aforesaid, to the persons last paying taxes upon such premises, where his residence is stated in said report, addressed to him at his place of residence as so shown, to-wit:

To....., addressed to .....  
 To....., addressed to .....  
 (etc.), a copy of the notice in the above entitled cause, published in the .....  
 ....., a newspaper, published and printed in the City of....., Illinois, a copy of which said notice being hereto appended, and referred to, and made a part hereof, by reference.

Affiant further says that on the.....day of....., A. D. 19...., he posted notices, of which the aforesaid notice is a copy, as follows, to-wit: By securely affixing the same, one to the....., premises No. .... Street, one to the....., premises No. .... Street; that said places are two public places in the City of ....., Illinois, and are in the vicinity and neighborhood of said improvement.

.....  
 SUBSCRIBED and sworn to before me this.....day of.....  
 ....., 19....

.....,  
 Notary Public.

## FORM NO. 74

### CERTIFICATE OF PUBLICATION—CONDEMNATION

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the .....Term, A. D. 19....

City of ....., Illinois, }

—vs.—

.....  
 And all other persons having or claiming interest in any of the premises designated and described, "All Whom It May Concern," }

Defendants.

In the Matter of the Petition of the City of.....,  
 Illinois, to Ascertain the Compensation for Private Property to be

Taken or Damaged for the Local Improvement of.....  
 .....,  
 what Property will be Benefited by such Improvement and the Amount  
 Thereof.

This affiant, ....., being duly sworn, on oath  
 says and certifies that he is the publisher of the .....,  
 a newspaper of general circulation regularly printed and published in  
 the City of ....., .....County,  
 Illinois: for at least six months prior to the date of the first publication  
 of said notice, that as such publisher he has charge of and superintends  
 the publication of the said..... and that a  
 notice, of which the printed notice attached hereto is a true copy, has  
 been published four weeks consecutively, at least once in each week, in  
 said newspaper, printed and published as aforesaid; that the date of the  
 first paper containing said published notice was on the..... day of  
 .....A. D. 19...., and that the date of the last paper con-  
 taining the same was on the.....day of .....19....

Dated....., Illinois, ....., 19....  
 ....., Publisher.

SUBSCRIBED and sworn to before me this.....day of.....,  
 ....., 19....

.....,  
 Notary Public.

## FORM NO. 75

### AGREEMENT TO APPORTION INTERESTS IN PROPERTY ASSESSED AMONG SEVERAL OWNERS— DIRECTED TO THE ASSESSOR

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the.....Term, A. D. 19....

In the Matter of the Petition of the City of.....,  
 Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
 Improvement of .....  
 .....

Mr. ....,

Appointed to make the assessment in the above entitled cause.

The undersigned, being the sole and several owners of the property  
 described in the hereto attached schedule, respectfully request and hereby  
 authorize you to cause the assessment against said property, and each  
 installment thereof, to be apportioned upon our respective interests in  
 manner and form and in the amounts set forth in the schedule hereto

attached, and also authorize you to file this request and authority with the files in the above entitled cause and to make the same a part thereof.

.....Name. ....Address.  
 .....Name. ....Address.  
 .....Name. ....Address.

### FORM NO. 76

#### PETITION TO APPORTION INTERESTS IN PROPERTY ASSESSED AMONG SEVERAL OWNERS— DIRECTED TO THE COURT

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the.....Term, A. D. 19....  
 In the Matter of the Petition of the City of.....,  
 Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
 Improvement of .....  
 .....

#### *To the Honorable Judge Presiding:*

The undersigned, being the sole and several owners of the property mentioned and described in the hereto attached schedule, assessed for benefits in the above entitled cause in the assessment roll, filed herein, respectfully petition your Honorable Body that the assessment against the said property, and each installment thereof, be apportioned upon our several interests in the said property in manner and form and in the amounts set forth in the hereto attached schedule, as may appear to the Court to be just and proper in the premises.

.....Name. ....Address.  
 .....Name. ....Address.  
 .....Name. ....Address.

### FORM NO. 77

#### REQUEST BY OWNERS OF PROPERTY THAT AN ASSESSMENT AGAINST TRACT OF LAND BE DIVIDED— DIRECTED TO ASSESSOR

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the.....Term, A. D. 19....  
 In the Matter of the Petition of the City of.....,  
 Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
 Improvement of .....  
 .....

Mr. ....,

Appointed to make the assessment in the above entitled cause.

The undersigned, being the sole owner....of the property described in the schedule hereto attached, do hereby respectfully request and authorize you to cause the assessment against the said property, and each installment thereof, for the improvement involved in the above entitled cause, to be divided and apportioned according to the division of said tract of land contained in the said attached schedule, instead of causing an assessment to be made on the said property as a whole.

You are hereby authorized to file this request and authority with the files in the above entitled cause and to make the same a part thereof.

.....Name.	.....Address.
.....Name.	.....Address.
.....Name.	.....Address.

# FORM NO. 78

## PETITION BY OWNERS OF PROPERTY THAT AN ASSESSMENT AGAINST TRACT OF LAND BE DIVIDED— DIRECTED TO THE COURT

STATE OF ILLINOIS,	} ss.
County of .....	

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of.....,  
Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
Improvement of .....

To the Honorable Judge Presiding:

The undersigned, being the sole owner.....of the property described in the schedule here attached, which has been assessed benefits in the above entitled cause in the assessment roll filed herein, respectfully petition your Honorable Body that the assessment against the said property, and each installment thereof, be divided and apportioned so that the assessment against said property, as a whole, and each installment thereof, may be divided and apportioned according to the division made in the said hereto attached schedule, as may appear to the Court to be just and proper in the premises.

.....,  
.....,  
.....,

## FORM NO. 79

## OBJECTION FILED TO ASSESSMENT PROCEEDINGS

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the .....Term, A. D. 19....

The undersigned, being the..... of the following  
 described property, to-wit: .....  
 .....  
 which has been assessed benefits in the above entitled cause, comes and  
 defends, etc., and objects to the confirmation of the assessment roll filed  
 herein, for the reasons and because:

1st. etc. (Here set out objections.)

And this objector ever prays, etc.

.....,  
 Objector.

## FORM NO. 80

## WAIVER OF TRIAL BY JURY

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the .....Term, A. D. 19....

In the Matter of the Petition of the City of.....,  
 Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
 Improvement of .....  
 .....

Now comes the Petitioner in the above entitled cause, by .....  
 ....., its attorney, and the undersigned, objector herein,  
 in person (or by ....., attorney), and by agree-  
 ment, trial by jury of the objections filed herein is waived.

City of ....., Ill.,

By .....  
 Its Attorney.

.....,  
 Objector.

## FORM NO. 81

## ORDER OF COURT ON CONFIRMATION—NO OBJECTIONS

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of.....,  
Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
Improvement of .....  
.....

Now, on this.....day of....., A. D. 19...., it being one  
of the regular judicial days of the.....Term, A. D. 19...., of  
said Court, comes the Petitioner herein, the City of.....,  
Illinois, by ....., its attorney, and moves the  
Court for default herein, and for judgment of confirmation of the report  
and assessment roll herein. And this cause coming on to be heard, upon  
the evidence introduced by the Petitioner herein, no objections to said  
assessment or proceedings having been filed herein and no defense thereto  
having been made, and the Court being fully advised in the premises,  
it is found and adjudged by the Court that the recommendation of the  
improvement herein, by the Board of Local Improvements of said city  
to the City Council of said city, relative to said improvement and the  
estimate of the cost of said improvement submitted to the City Council  
of said city, as required by law, and the ordinance submitted to said  
City Council by the said Board of Local Improvements, providing for  
said improvement, were each and all duly and legally adopted, passed and  
approved by the City Council of said city, and said ordinance approved  
by the Mayor thereof, and are in all respects legal and sufficient; and  
that all the preliminary requirements of the law have been duly and  
fully complied with; that the petition filed by the said City of.....  
....., praying that steps may be taken to levy a special assess-  
ment for said improvement, and the copies of the said ordinance, recom-  
mendation and estimate filed herewith, and made a part thereof, together  
with the certificates of the Clerk of the said city, thereto, are in all  
respects legal and sufficient; that notice was duly given as required by  
law, among other things, of the nature of the above stated improve-  
ment, of the pendency of this proceeding, of the time and place of  
filing the petition therefor, of the time and place of the filing of the  
assessment roll herein, and of the time and place at which application  
will be made for the confirmation of the assessment herein, which notices  
were duly mailed more than fifteen days before the date at which ap-  
plication for the confirmation of the assessment roll herein would be  
made, which said notices were sent by mail postpaid to each of the

persons paying the taxes on the respective parcels during the last preceding year in which taxes were paid, at his place of residence as shown in the assessment roll filed herein, or where such residence is not shown in the said assessment roll, then to such persons so paying the taxes as aforesaid, directed generally to the City of....., Illinois; that such notices, among other things, stated the amount assessed to the person to whom the same was directed, for the proposed improvement, the total amount of the cost of said improvement, and the total amount assessed as benefits upon the public, and that said notices were in all respects legal and sufficient and given in manner and form and for the time prescribed by law.

That in addition to the other notices by law required, notices were posted in at least four public places in the neighborhood of said improvement in the said City of....., and a like notice was published ("at least five successive days," or "once in each week for two successive weeks," as the case may be) in the..... (a "daily" or "weekly," as the case may be) secular newspaper of general circulation, regularly published in the said City of....., for at least six months prior to the first publication of said notice. That the said notices were posted and the said first publication of the notice aforesaid was made at least fifteen days prior to the time at which confirmation of said assessment was sought, and that each of said notices were over the name of the officer levying the assessment herein, and substantially as prescribed by the statutes of this state in such cases, stating also that the said assessment is payable in installments, the number of installments and the rate of interest thereon, and that said notices were in all respects legal and sufficient, and posted and published in manner and form and for the time prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming interest in any of the property mentioned or described in the assessment roll herein, and of the property therein described, and of the cause and the subject-matter thereof; that all proceedings and steps by law required or prescribed have been duly and fully complied with and taken in manner and form as prescribed by law.

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT, That default be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the said assessment roll and report for said improvement, returned and filed in this Court, and against all owners and persons interested in the same, and that said report and assessment roll, and all proceedings therein, and thereon, be and the same are hereby confirmed, and judgment of confirmation be and the same is hereby entered accordingly.

IT IS FURTHER ORDERED BY THE COURT, That the Clerk of this Court certify the said assessment roll confirmed as aforesaid, together with this judgment and his warrant, to the..... of said City of....., as required by law.

Approved: ....., Judge.



FORM NO. 82

(SHORT FORM) ORDER OF COURT OF CONFIRMATION—NO  
OBJECTIONS

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,

To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

Now, on this.....day of ....., A. D. 19....,  
it being one of the regular judicial days of the.....  
Term, A. D. 19...., of said Court, comes the Petitioner herein, the City  
of....., Illinois, by....., its at-  
torney, and moves the Court for default herein, and for judgment of con-  
firmation of the report and assessment roll herein. And this cause coming  
on to be heard, and the Court having heard the evidence introduced by  
the Petitioner herein, and no objections to said assessment or proceedings  
having been filed herein, and no defense thereto having been made, and  
the Court being fully advised in the premises, it is found and adjudged  
by the Court, that all the requirements of the law as to posting, publishing  
and mailing notices to the owners of property assessed, have been com-  
plied with, and that due notice, in manner and form and for the time, as  
required by law, has been given of this application, and of the making and  
return of the said assessment, and of the time for the final hearing thereon;  
and that all other preliminary requirements of the law have been duly  
and fully complied with; that all the steps prescribed by law have been  
taken in manner and form as provided by law; and that this Court has  
full and complete jurisdiction in the premises.

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT, That default  
be and the same is hereby entered against each and all of the lots, blocks,  
tracts and parcels of land and property assessed and described in the  
said assessment roll and report for said improvement, returned and filed  
in this Court, and against all owners and persons interested in the same,  
and that said report and assessment roll, and all proceedings therein,  
and thereon, be and the same are hereby confirmed, and judgment of  
confirmation be and the same is hereby entered accordingly (as follows,  
to-wit: Here copy assessment roll as confirmed. See Note.)

IT IS FURTHER ORDERED BY THE COURT, That the Clerk of this Court  
certify the said assessment roll confirmed as aforesaid, together with this  
judgment and his warrant, to the.....of said City of  
....., as required by law.

Approved: ..... Judge.

NOTE:—This form must, of course, vary to conform to the proceedings

had in the particular case, especially so, when the assessments have in any way been changed, by other orders of this Court, which may be incorporated in this general order or covered by independent orders.

It is quite advisable to provide in the order of confirmation that the assessment roll, as confirmed, be copied in the records of the Court, and thus relieve against the possibility of its loss or destruction. When this is desired it may be done as indicated in this form.

### FORM NO. 83

#### RESOLUTION OF BOARD DESIGNATING NEWSPAPER FOR ADVERTISEMENT FOR BIDS

*Be it Resolved*, By the Board of Local Improvements of the City of ..... Illinois, that....., a newspaper, published in the City of....., Illinois, be and the same is hereby adopted for the purpose of publishing advertisements that bids will be received for constructing local improvements.

### FORM NO. 84

#### RESOLUTION—ORDER OF BOARD TO ADVERTISE FOR BIDS

*Be it Resolved*, By the Board of Local Improvements of the City of ..... Illinois, that advertisement for proposals for bids for the improvement of....., be made and ordered in the....., a newspaper published in this city, in accordance with the form of "The Notice of Proposal for Bids," submitted at this meeting; that said bids shall be opened on the..... day of....., A. D. 19...., at the hour of..... o'clock.....M. And be it also resolved, that the form of the "Instructions to Bidders," "Contractor's Proposal," "Contract" and "Bond" at this meeting submitted, be adopted by this Board.

### FORM NO. 85

#### NOTICE OF PROPOSAL FOR BIDS

##### Notice to Contractors

Sealed bids will be received for the construction of the improvement of (here describe improvement), by the Board of Local Improvements of the City of....., Illinois, until the.....day of ..... A. D. 19...., at the hour of..... o'clock

.....M., at its office, in the....., in the said City of....., Illinois, at which time and place said bids will be publicly opened.

It is estimated that there will be about (here give estimate of quantities).

Said improvement shall be constructed and made in accordance with the ordinance providing for the same and the maps, plats, plans, profiles and specifications for the same on file in the office of the..... of said city.

Proposals must be made on blanks furnished by said Board and in compliance with the instructions thereto attached, which can be had on application to the....., and must be accompanied by cash or by a check payable to the order of the President of said Board of Local Improvements in his official capacity, certified by a responsible bank, for an amount not less than ten per cent. (10 per cent.) of the aggregate of the proposal.

The contractor shall be paid in (here specify; if payment is to be made in bonds, state rate of interest they bear).

No bids will be received unless the party offering it shall furnish evidence satisfactory to said Board of Local Improvements that he has the necessary facilities, ability and pecuniary resources to fulfill the conditions of the contract and execute the work should the contract be awarded to him.

Bidders will examine the ordinance, maps, plats, plans, profiles and specifications, and also the locality in which said work is to be done and judge for themselves of all the circumstances and surrounding conditions affecting the cost and nature of the work.

The Board of Local Improvements reserves the right to reject any and all bids, as authorized by law.

Dated....., Illinois, ....., 19....  
.....,  
.....,  
.....,  
.....,

Board of Local Improvements of the City of....., Ill.

## FORM NO. 86

### INSTRUCTIONS TO BIDDERS

Improvement of....., From.....  
To .....

1. Sealed proposals will be received by the Board of Local Improvements of the City of....., Illinois, until....., 19...., at ..... o'clock.....M., in accordance with the official advertisement.

2. Proposals must be made out upon the accompanying blank form, addressed to President, and endorsed "Proposal for....."

3. All bids must be accompanied by cash or by a certified check on some responsible bank for an amount equal to ten (10) per cent. of the total amount of the bid, and made payable to the order of....., President of the Board of Local Improvements, the same to be refunded or returned to the undersigned upon the faithful performance of the conditions of this proposal to the satisfaction of said Board of Local Improvements.

4. The person or persons to whom the contract may be awarded will be required to execute contract and bond, with sureties, within the time provided by law, a blank form of which said contract and bond may be had on application to the.....of said city; and in case of failure or neglect to do so, he, or they, will be considered as having abandoned it, and the above mentioned deposit shall thereupon be forfeited to the City of....., and collected as provided by law; and thereupon, the work will be re-advertised and re-let, and so on, until the contract be accepted and executed.

5. The successful bidder will be required to furnish approved bond, as provided by law, for the faithful performance of the contract, in the penal sum of \$.....

6. No bid will be considered unless the party offering it shall furnish evidence satisfactory to the Board of Local Improvements, that he has the necessary facilities, ability, and pecuniary resources to fulfill the conditions of the contract.

7. The prices must be written in the bid, and also stated in figures, and if any discrepancy occurs between the written and figured prices, those most favorable to the city will be taken as the intention of the bidder.

8. All bids must be made for materials in the different classes furnished in the work complete, and no estimate will be made on any part of the work not finished, nor on materials, except in completed work.

9. Permission will not be given for the withdrawal of any bid or proposal.

10. No contract will be awarded to any person who has been delinquent or unfaithful in any former contract with this city, or who is a defaulter as surety or otherwise upon any obligation to the said city.

11. Bidders will state the name of the brick and also the kind of stone curbing on which the bids are based.

12. Bidders will examine the plans and the ground, and judge for themselves of all the circumstances affecting the cost and nature of the work, and must also examine the ordinance for said improvement, and the maps, plans, profiles and specifications for the doing of said work, on file in the office of the.....

13. The Board of Local Improvements reserves the right to reject any and all bids.

.....,  
.....,  
.....,

Board of Local Improvements of the City of....., Ill.

NOTE—These instructions are generally attached to or printed with the blank proposals.

## FORM NO. 87

CONTRACTOR'S PROPOSALS FOR IMPROVEMENT OF.....  
STREET, FROM.....TO.....

*To the Board of Local Improvements:*

1. The undersigned bidder, does hereby declare and stipulate that this bid is made in good faith, without collusion or connection with any other person or persons bidding for the same work, and that it is made in pursuance of and subject to all the terms and conditions of the foregoing instructions (or if instructions are separate, then "conditions of the instructions of your Board").

2. The undersigned, having carefully examined the ordinance providing for this improvement and the specifications, maps, plats, plans and profiles, containing further detailed specifications and illustrations as the same appear on file in the office of the.....of the said city, hereby propose to provide all necessary machinery, tools, apparatus and other means for the construction of the improvement above mentioned, and do all the work and furnish all labor and material required to make this improvement, in the manner prescribed by the ordinance, and the said specifications, maps, plats, plans and profiles therefor, for the following prices:

Finished Pavement, Including Excavation, Grading and all Labor and Material Necessary to make the Finished Pavement Complete, per Square Yard.	PRICES.			
	In Writing.		In Figures.	
	Dol.	Cts.	Dol.	Cts.
Name of Brick.				
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
Curbing in Place, Complete, per Lineal Foot.				
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

Sewer in Place, Complete, Including Excavation, Backfilling and all Necessary Fittings, per Lineal Foot.				
6-inch sewer pipe .....	.....	.....	.....	.....
8-inch sewer pipe .....	.....	.....	.....	.....
10-inch sewer pipe .....	.....	.....	.....	.....
12-inch sewer pipe .....	.....	.....	.....	.....
15-inch sewer pipe .....	.....	.....	.....	.....
18-inch sewer pipe .....	.....	.....	.....	.....
20-inch sewer pipe .....	.....	.....	.....	.....
24-inch sewer pipe .....	.....	.....	.....	.....
27-inch sewer pipe .....	.....	.....	.....	.....
30-inch sewer pipe .....	.....	.....	.....	.....
36-inch sewer pipe .....	.....	.....	.....	.....
.....Man-holes, complete, including covers, each .....	.....	.....	.....	.....
.....Catch-basins, complete, includ- ing covers, each.....	.....	.....	.....	.....
Etc.				

Firm bidding must, in each instance, give the individual names and addresses of each member of said firm. Where the bid is made by a corporation, it must sign by its proper officers; also the address of such corporation must be given. All bids must be in ink.

Given under.....hand..., this.....day of....., 19...., .....

NOTE:—Add other elements of improvement provided for in the ordinance and not embraced within those above mentioned.

FORM NO. 88

BOARD OF LOCAL IMPROVEMENTS, ....., ILL.

CONTRACT

THIS AGREEMENT, Made and entered into this.....day of ....., A. D. 19...., between ..... of ....., hereafter, for convenience, designated "Contractor," party of the first part, and the City of....., a municipal corporation of the County of....., State of Illinois, hereinafter, for convenience, designated the "City," party of the second part;

WITNESSETH, That the said "Contractor," for and in consideration of the payments to be made by the said "City" as herein set forth, hereby covenants and agrees to provide all necessary machinery, tools, apparatus and other means for the construction of the improvement of

and do all work and furnish all labor and material required to make said improvement according to the ordinance, hereinafter referred to, on file in the office of the City Clerk of said city, and the maps, plats, plans, profiles and specifications, for the doing of said work, on file in the office of the City ..... of said "City."

All material used, all work performed, and all regulations of every kind and character, governing the construction of said improvement, shall strictly conform to the said ordinance for said improvement, passed by the City Council of said City of.....on the..... day of....., A. D. 191., and approved on the..... day of....., A. D. 191., and known as and numbered "Ordinance No. ....," and the said maps, plats, plans, profiles and specifications, which said ordinance, maps, plats, plans, profiles and specifications, and each and every section and part thereof, are hereby referred to and made a part of this contract by reference, as fully and completely as though the same were written or set out at length herein.

The brick used in constructing said pavement shall be....., and shall be of the manufacture of.....

The curbing used in said improvement shall be from the..... stone quarry, located at.....

The instructions to bidders herein, and the proposal of the "Contractor" to the Board of Local Improvements of the City of....., are hereby referred to and made a part of this contract by reference, and the prices in said bid contained are hereby agreed upon and accepted by the respective parties as governing the prices to be paid for said improvement, and are as follows:

(Here set out.)

The "Contractor" has entered into and herewith tenders a bond of even date herewith, in the penal sum of..... Dollars, to insure the faithful performance of this contract, which said bond is hereby made a part of this contract by reference.

Said work to be begun on or before the.....day of....., A. D. 191., to progress regularly and uninterruptedly, after it shall have been begun, except in cases of strikes, accidents and unavoidable delays, and excepting as it shall be otherwise ordered by the Board of Local Improvements of said city, and be finished and fully completed on or before the.....day of....., A. D. 191., the time of beginning, rate of progress and time of completion being essential conditions of this contract; *Provided, however*, that if the time of the performance of the contract herein, be for any reason, either expressly or by implication, extended, such extension shall not

effect the validity of this contract, nor the liability of the sureties upon the bond, herein mentioned or referred to.

It is expressly understood and agreed that the entire improvement shall be done in a thorough and workmanlike manner, under the direction and to the satisfaction of the Board of Local Improvements of said city. All loss or damage arising out of the nature of the work to be done, or from any detention or unforeseen obstruction or difficulty which may be encountered in the prosecution of the work, or from the action of the elements, shall be sustained by the said "Contractor."

Said "Contractor" will be held responsible for all accidents, and hereby agrees to indemnify and protect the said "City" from all suits, claims and actions brought against it, and all costs and damages, which the said "City" may be put to by reason of an injury, or alleged injury, to the person or property of another in the execution of this contract, or the performance of the work, or in guarding the same, or for any material used in its prosecution or in its construction.

Should the work under this agreement not be finished within the time specified, said "Contractor" shall forfeit the sum of..... Dollars (\$.....) to the said "City" as liquidated damages, for each and every day which shall elapse after the expiration of the time herein agreed upon for the completion of said work, which amount shall be retained from the contract price of said work; *Provided*, the Board of Local Improvements of the said "City" may waive this provision or rebate said forfeit, if it so elects.

Any person employed on the work who shall refuse or neglect to obey the directions of the said Board of Local Improvements, or....., or who shall be deemed by the said Board to be incompetent, or who shall be guilty of any disorderly conduct, or who shall commit any trespass on any public or private property in the vicinity of the work, shall at once be removed from the work by the "Contractor" when so requested by the said Board.

The sums of money herein provided to be paid to said "Contractor" are payable solely out of the proceeds of the special assessment levied, or out of the proceeds of any special assessment which may hereafter be levied for said improvement, when collected; and in no case, except as otherwise provided in the ordinance or the judgment of the Court confirming the said assessment, or as may be otherwise provided by statute, shall said Board of Local Improvements or any member thereof, or said "City," or any Alderman or officer thereof, be liable for any portion of the expenses or any delinquencies of persons or property assessed.

It is expressly agreed and understood that all bonds and vouchers issued for work or material to the said "Contractor," shall be paid when the assessment or assessments levied, or which may be levied for said improvement, shall be collected, as provided by law, and that said vouchers and bonds, and interest thereon, are payable only from such special assessment or assessments, and out of no other assessment or fund whatever, and that all vouchers and bonds and interest thereon, for part of any



installment, shall only share pro rata with the vouchers and bonds, and interest thereon, for the remaining part thereof.

In case the said "City" shall become the purchaser of any special assessment certificates at any sale for delinquent special assessments, in default of other bidders, such purchase shall not be deemed a collection of such special assessment, and no act of the "City," done or suffered, shall be construed as a collection of any special assessment, or part thereof, until the money due thereon shall be actually paid into the treasury.

The said "City" hereby covenants and agrees, in consideration of the covenants and agreements in this contract specified, to be kept and performed by the said "Contractor," subject to the conditions herein contained, to cause to be made, by the.....of said "City" on the.....day of each and every month during the progress of the work herein provided, estimates of the amount and value of the work then actually constructed and in its permanent place; and vouchers against the special assessment levied to pay for this improvement, to the amount of 85 per cent. of the estimated value of said work, actually constructed and in its permanent place for the then expiring month, will be issued and delivered to said contractor; said vouchers being redeemable in ....., at the office of the.....in said city, the remaining 15 per cent. of the amounts of said estimates and due under this contract, to be retained as a guarantee against poor workmanship and material, until the work contemplated by this contract has been fully completed and accepted by the Board of Local Improvements, and such acceptance and completion, certified and confirmed by the Court in which the assessment for the said improvement was confirmed, as required by law, and when such completion is so confirmed by said Court, said remaining 15 per cent. is to be paid or delivered to said "Contractor" in....., it being agreed that said "Contractor" is to be paid for said improvement in.....

The "City" reserves the right at all times to refuse to issue a voucher against the assessment for this improvement in case the said "Contractor" has neglected or failed to pay any sub-contractor, workman or employee on the work.

No part of the work herein provided for shall be sublet or sub-contracted, without the express consent of the said Board of Local Improvements, to be entered in its records, and in no case shall such consent relieve said "Contractor" from the obligation herein entered into, or change the terms of this agreement.

It is further covenanted and agreed by and between the parties hereto .....

This contract shall extend to and be binding upon the successors and assigns, and upon the heirs, administrators, executors and legal representatives of the "Contractor."

IN WITNESS WHEREOF, The said "Contractor" has hereunto set .....hand.....and seal....., and the said "City" has caused this agreement to be signed by the President of the Board of Local

Improvements, countersigned by its Secretary, the day and year first above written.

.....(Seal)

.....(Seal)

.....(Seal)

City of....., Ill.,

By.....,

President Board of Local Improvements.

.....,

Secretary Board of Local Improvements.

## FORM NO. 89

### CONTRACTOR'S BOND

KNOW ALL MEN BY THESE PRESENTS, That we, .....  
 .....  
 .....

of the County of....., and State of.....,  
 are held and firmly bound unto the City of....., Illinois,  
 in the penal sum of.....Dollars, lawful money  
 of the United States, for the payment of which, well and truly to be  
 made, we bind ourselves, our heirs, executors, and administrators, jointly,  
 severally, and firmly by these presents.

Witness our hands and seals this.....day of.....,  
 A. D. 191...

The condition of the above obligation is such, that, whereas, the above  
 bounden ha..... entered into a certain contract with the City of.....  
 ....., Illinois, bearing date the.....day of.....  
 ....., A. D. 191., which said contract, together with the maps,  
 plats, plans, profiles and specifications, referred to therein and made a  
 part thereof, by reference, are hereby expressly referred to and made a  
 part hereof, by reference, for the improvement of.....  
 .....  
 in said city, in accordance with the provisions of said ordinance author-  
 izing the doing of said work, and made a part of said contract by reference,  
 and hereby made a part of this bond by reference.

Now, therefore, if the said.....shall in all re-  
 spects, well and truly keep and perform the said contract on.....  
 .....part to be performed in strict accordance with the terms  
 thereof and the said ordinance, maps, plans, plats, profiles and specifica-  
 tions referred to, and in the time and manner therein prescribed, and  
 further shall indemnify, keep and save harmless, the said City of.....  
 ....., against all claims, losses, demands, liabilities, suits, judg-  
 ments, costs, damages and expenses, which may in any way be made,

brought, sustained, or recovered, against said city, or which may, in any-  
wise, come against said city, in consequence of the awarding or execution  
of such contract, or the doing of the work or making of the improve-  
ment therein provided for, or which may in anywise result from the care-  
lessness or neglect of said....., agents, employees  
or workmen in any respect whatever, or which may result on account of  
any infringement of any patent, by reason of any of the materials, ma-  
chinery, devices, or apparatus used or employed in the performance of  
said contract, or the work therein provided, and, moreover, shall pay to  
said city any sum or sums of money determined by the Board of Local  
Improvements of said city, to be due said city, by reason of any failure  
or neglect in the performance of the requirements of said contract, where-  
fore, the said Board of Local Improvements shall have elected to suspend  
the same, and shall pay the cost of making good defects, faults and im-  
perfections appearing or existing in said work or improvement, then this  
obligation to be null and void, otherwise to remain in full force and effect.

And it is hereby expressly understood and agreed, and made a condition hereof, that any judgment rendered against said city, as aforesaid, because of anything herein, or in said contract contained or provided for, when notice of the pendency of such suit shall have been given said ..... shall be conclusive against each and all parties to this obligation as to amount, liability, and all other things pertaining thereto.

.....(Seal.)  
 .....(Seal.)  
 .....(Seal.)  
 .....(Seal.)

**Approved:** .....

.....

.....

.....

.....Clerk.

STATE OF ILLINOIS, } ss.  
County of ..... }

I, ....., a Notary Public, in and for said county, in the state aforesaid, do hereby certify that..... who are each personally known to me to be the same persons whose names are subscribed to the above and foregoing bond, appeared before me, this day, in person, and severally acknowledged that they signed and sealed the said instrument, as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this.....day of.....  
....., A. D. 19....

.....,  
Notary Public.

STATE OF ILLINOIS,  
County of ..... } ss.

....., being duly sworn, on oath, depose and say that we are each worth the sum of..... Dollars, over and above all incumbrances and statutory exemptions.

SUBSCRIBED and sworn to before me, this.....day of....., 19....

.....,  
Notary Public.

STATE OF ILLINOIS,  
County of ..... } ss.

....., being duly sworn, on oath deposes and says that he is worth the sum of..... Dollars, over and above all incumbrances and statutory exemptions.

SUBSCRIBED and sworn to before me, this.....day of....., 19....

.....,  
Notary Public.

## FORM NO. 90

### GENERAL ORDER OF BOARD DESIGNATING NEWSPAPER IN WHICH TO PUBLISH AWARDS

*Be it Resolved*, That all notices of awards of contracts by this Board, under and by virtue of an Act entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, be advertised in the....., a ..... newspaper, published and circulated in this city.

*Be it further Resolved*, That this order be entered in full in the records of this Board.

## FORM NO. 91

### NOTICE OF AWARD

Notice is hereby given that the Board of Local Improvements of the City of....., Illinois, at a meeting held on the..... day of....., 19...., did award the contract for the construction of the improvement of (here describe), as contemplated by Ord-

nance No. ...., to....., on.....  
proposal as follows.

Dated....., Illinois, ....., 19....

President of the Board of Local Improvements of....., Ill.

## FORM NO. 92

### FIRST VOUCHER ON ACCOUNT OF WORK DONE

....., Ill.,....., 19....

*Voucher No.* ..... *Special Assessment No.* .....

*To the Treasurer of the City of....., Ill.:*

From the funds realized from the collection of the first installment of the special assessment levied by the City of....., Illinois, and confirmed by the.....Court of.....County, Illinois, for the improvement of..... in said city, as provided for in and by Ordinance No.....of said city, but out of no other tax or fund, pay to.....the sum of.....Dollars (\$.....).

This voucher is given on account of work done in pursuance of contract entered into for the making of the above mentioned improvement and is the *first* voucher issued on account of such work done.

The holder hereof expressly agrees in all things to be governed by an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and all acts amendatory thereof.

This voucher is payable at the office of the City Treasury of the City of....., Illinois, solely out of the collection of the first installment of said assessment.

City of ..... , Ill.,  
By .....

Attest: .....

NOTE:—Other vouchers against the first installment may be drawn to conform to the form above given.

The first voucher "on account of work done" need not necessarily be drawn against the first installment. That installment may be exhausted by other vouchers having a preference upon it.

## FORM NO. 93

## VOUCHER REDEEMABLE IN BONDS

....., Ill.,....., 19....

*Voucher No.* ..... *Special Assessment No.* .....

*To the Treasurer of the City of*....., Ill.:

Of the bonds issued or to be issued in anticipation of the collection of the deferred installments of the special assessment levied by the City of....., Illinois, and confirmed by the..... Court of..... County, Illinois, for the purpose of improving ..... in said city, as provided for in and by Ordinance No. .... of said city, pay and deliver to..... special assessment bonds to the amount of..... Dollars (\$.....), deducting, however, the interest accrued on the same to this day.

This voucher is given on account of payment of.....

The holder thereof expressly agrees in all things to be governed by an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and all acts amendatory thereof.

City of ..... , Ill,  
By .....

Attest: .....

## FORM NO. 94

## VOUCHER PAYABLE IN MONEY FROM SALE OF BONDS

....., Ill.,....., 19....

*Voucher No.* ..... *Special Assessment No.* .....

*To the Treasurer of the City of*....., Ill.:

From the funds realized or to be realized from the sale of the bonds issued in anticipation of the collection of the deferred installments of the special assessment levied by the City of....., Illinois, and confirmed by the..... Court of..... County, Illinois, for the purpose of improving..... in said city, as provided for in and by Ordinance No. .... of said city, but out of no other tax or fund, pay to..... the sum of..... Dollars (\$.....).

This voucher is given in payment of.....  
 .....

The holder thereof expressly agrees in all things to be governed by an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and acts amendatory thereof. Payable at the office of the Treasurer of the City of....., Illinois.

City of ....., Ill,

By .....

Attest: .....

# FORM NO. 95

## FIRST VOUCHER CERTIFICATE

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
 to Levy a Special Assessment to Pay the Cost of the Local Improve-  
 ment of .....  
 .....

To the Clerk of the.....Court, .....County, Ill.:

By virtue of the requirements of an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, and amendments thereto, the Board of Local Improvements of the City of....., Illinois, does hereby certify that on the.....day of....., 19...., there was issued to....., a first voucher on account of work done on the above named improvement, in the amount of \$.....

Approved and signed by the Board of Local Improvements of the City of....., Illinois, and its Secretary, this.....day of....., 19....

.....,  
 .....  
 .....

Board of Local Improvements of the City of....., Ill.  
 ....., Secretary.

## FORM NO. 96

## ENGINEER'S REPORT OF FINAL COMPLETION TO BOARD

....., Ill., ....., 19....

To the Board of Local Improvements of the City of.....,  
 Illinois:

Gentlemen:—I beg to certify that the work of the local improvement of.....Street, in the City of....., Illinois, from the.....line of....., Street, to the.....line of....., Street, has been finally completed, and that the cost of the same is as follows:

.....Sq. yds. of paving at \$..... per sq. yd. ....	\$.....
.....Lin. ft. curbing at \$..... per ft. ....	\$.....
Total due contractor .....	\$.....

*Recapitulation.*

Estimated cost of improvement .....	\$.....
Amount paid contractor .....	\$.....
Amount due contractor .....	\$.....
Court costs and necessary expenses.....	\$.....
	\$.....

Amount estimated to pay accruing interest on bonds and  
 vouchers issued to anticipate collection of assess-  
 ment .....

Amount to be rebated .....

.....

Respectfully submitted,

.....,  
 Engineer.

## FORM NO. 97

APPLICATION OF BOARD ON CERTIFICATE OF COMPLETION  
AND ACCEPTANCE

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,  
 To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
 to Levy a Special Assessment to Pay the Cost of the Local Improve-  
 ment of .....



**Application and Certificate of Board of Local Improvements on Completion of Work.**

*To the Honorable Judge Presiding:*

Now comes the Board of Local Improvements of the City of....., Illinois, and presents herewith its certificate of the final completion and acceptance of the work provided for in the above mentioned proceedings, and causes the cost thereof, together with the amount estimated by the said Board to be required to pay accruing interest on bonds and vouchers issued to anticipate collection of the assessment herein, to be certified to this Court.

Wherefore, this Petitioner makes application to said Court to consider and determine whether or not the facts and matters stated in the hereto attached certificate are true, and to set a time and place to consider and determine such facts and matters.

.....,  
.....,  
.....,

Board of Local Improvements of the City of....., Ill.

**FORM NO. 98**

**CERTIFICATE OF COMPLETION AND ACCEPTANCE—WHEN ASSESSMENT DOES NOT EXCEED COST**

STATE OF ILLINOIS,  
County of ..... } ss.

In the..... Court,  
To the ..... Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improvement of .....  
.....

**Application and Certificate of Board of Local Improvements on Completion of Work.**

*To the Honorable Judge Presiding:*

The Board of Local Improvements of the City of....., Illinois, does hereby certify that the work on the improvement made in pursuance of the ordinance herein, has been finally completed and accepted by said Board of Local Improvements; that the cost of said improvement is the sum of \$.....; that the amount estimated by said Board to be required to pay accruing interest on bonds and vouchers issued to anticipate collection of the assessment herein, is the sum of \$.....; that the total amount assessed for said improvement upon the public and private property is the sum of \$....., and that

said last mentioned sum does not exceed the cost of said improvement and the amount estimated to be required to pay interest as herein above stated, and that, therefore, the judgment rendered herein shall not be reduced or in anywise abated.

And the assessment herein being divided into installments, said Board certifies that said improvement conforms substantially to the requirements of the original ordinance for the construction of the same.

.....,  
 .....  
 .....

Board of Local Improvements of the City of....., Ill.

### FORM NO. 99

#### CERTIFICATE OF COMPLETION AND ACCEPTANCE—WHEN ASSESSMENT EXCEEDS COST

STATE OF ILLINOIS, }  
 County of ..... } ss.

In the.....Court,

To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
 to Levy a Special Assessment to Pay the Cost of the Local Improve-  
 ment of .....  
 .....

Application and Certificate of the Board of Local Improvements on  
 Completion of the Work

*To the Honorable Judge Presiding:*

The Board of Local Improvements of the City of....., Illinois, does hereby certify that the work on the improvement made in pursuance of the ordinance herein, has been finally completed and accepted by said Board of Local Improvements; that the cost of said improvement is the sum of \$.....; that the amount estimated by said Board to be required to pay accruing interest on bonds and vouchers issued to anticipate collection of the assessment herein, is the sum of \$.....; that the total amount assessed for said improvement upon the public and private property is the sum of \$....., and that said last mentioned sum exceeds the cost of said improvement and the amount estimated to be required to pay interest as hereinabove stated, and that, therefore, the sum of \$.....shall be abated and the judgment entered herein shall be reduced and abated accordingly.

And the assessment herein being divided into installments, said Board certifies that said improvement conforms substantially to the requirements of the original ordinance for the construction of the same.

.....,  
 .....  
 .....

Board of Local Improvements of the City of....., Ill.

FORM NO. 100

ORDER OF COURT ON PRESENTATION OF APPLICATION AND  
CERTIFICATE OF BOARD

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

Application and Certificate of the Board of Local Improvements on  
Completion of Work

Now on this.....day of ....., A. D. 19....,  
comes the Board of Local Improvements of the City of.....,  
Illinois, and presents its certificate of final completion and acceptance of  
the improvement herein, and the cost thereof, together with its applica-  
tion to this Court, to consider and determine whether or not the matters  
and facts stated in said certificate are true.

IT IS ORDERED BY THE COURT, That a hearing thereon be had in this  
Court on the.....day of....., A. D. 19...., at  
the hour of.....o'clock.....M., or as soon thereafter as the  
business of the Court will permit.

IT IS FURTHER ORDERED BY THE COURT, That all objections to the said  
certificate and application be filed in said cause before the time set for  
such hearing.

.....,  
Judge of said Court.

FORM NO. 101

ORDER OF COURT CONFIRMING APPLICATION AND CERTIFI-  
CATE—NO OBJECTIONS—NO REBATE

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....  
.....

Application and Certificate of the Board of Local Improvements on  
Completion of the Work

Now on this.....day of....., A. D. 19...., this being one of the regular judicial days of the..... Term, A. D. 19...., of said Court, comes the Petitioner herein, the Board of Local Improvements of the City of....., Illinois, by....., its attorney, and moves the Court for default herein, and for the judgment of this Court, finding that all the matters and facts stated and alleged in the certificate filed herein, by said Board, are true, and that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; and this cause coming on to be heard upon the evidence introduced by the Petitioner herein, and no objections to said application and certificate or proceedings herein having been filed, and no defense thereto being made, and the Court being fully advised in the premises, it is adjudged by the Court that the application and certificate filed by the Petitioner herein are in all respects legal and sufficient; that notices of this hearing, as prescribed by law, were posted in at least four public places in the neighborhood of said improvement in said City of....., at least fifteen days prior to the time fixed for the hearing herein and hereon, and a like notice was published ("at least five successive days" or "once in each week for two successive weeks" as the case may be), in the..... (a "daily" or "weekly" as the case may be), secular newspaper of general circulation regularly published in the said City of....., for at least six months prior to the first publication of said notice; that the first publication of the notice aforesaid was had at least fifteen days prior to the time fixed by the Court for the hearing herein and hereon; that said notices, by posting and publishing, in all respects complied with the statutes of this state in such cases made and provided, and were in all respects legal and sufficient, and posted and published in manner and form prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming any interest in any of the premises mentioned and described in the assessment roll heretofore confirmed in this cause and of the property therein described and assessed, and of this cause and the subject-matter thereof.

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT, That default be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the said assessment roll and report for the said improvement as heretofore confirmed in this Court, and all persons having or claiming an interest in any of said premises.

The Court further finds and adjudges that all the matters and facts stated in said certificate filed in this cause by the said Board of Local Improvements are true; that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the

same; that the total amount assessed for the said improvement upon the public and private property does not exceed the cost of the said improvement and the amount estimated to be required to pay interest on bonds and vouchers issued to anticipate collection of said assessment, and that the said assessment as heretofore confirmed shall not be abated or reduced.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, That the said certificate of the said Board of Local Improvements be and the same is hereby, in all respects, approved and confirmed, and that the said assessment, as heretofore made upon the public and the private property owners, shall stand as heretofore confirmed by this Court.

Approved: \_\_\_\_\_,  
Judge.

# FORM NO. 102

## ORDER OF COURT CONFIRMING APPLICATION AND CERTIFICATE—OBJECTIONS—NO REBATE

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improvement of .....  
.....

### Application and Certificate of the Board of Local Improvements on Completion of the Work

Now on this.....day of....., 191., this being one of the regular judicial days of the.....Term, 191., of said Court, comes the Petitioner herein, by....., its attorney, and makes proof of giving of the notice by law required, by posting and publishing, and moves the Court for default herein against all persons and property on account of which objections have not been heretofore filed.

And the Court being fully advised in the premises, it is ordered and adjudged by the Court that default be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the assessment roll and report for the improvement herein, heretofore confirmed in this Court and all persons having or claiming an interest in any of said premises on account of which objections have not been heretofore filed.

And now on this.....day of ....., A. D. 19...., it being also one of the regular judicial days of the....., 19...., Term of this Court, this cause coming on to be heard upon the objections filed by....., herein, and the Court having heard the evidence and arguments of counsel and being fully advised in the premises, orders and adjudges that said objections be and the same are hereby overruled.

And now on the.....day of....., 19...., it being also one of the regular judicial days of said term of said Court, comes the Petitioner herein and moves the Court for judgment on the certificate and application heretofore filed herein, and this cause coming on to be heard upon said motion, and the Court having heard the evidence introduced by the Petitioner herein and the arguments of counsel, and being fully advised in the premises, and all objections having been disposed of, it is found and adjudged by the Court that the application and certificate filed by the Petitioner herein are in all respects legal and sufficient; that notices of this hearing, as prescribed by law, were posted in at least four public places in the neighborhood of said improvement in said City of....., at least fifteen days prior to the time fixed for the hearing herein and hereon, and a like notice was published ("at least five successive days" or "once in each week for two successive weeks" as the case may be), in the..... (a "daily" or "weekly" as the case may be) secular newspaper of general circulation, regularly published in the said City of....., for at least six months prior to the first publication of said notice; that the first publication of the notice aforesaid was had at least fifteen days prior to the time fixed by the Court for the hearing herein and hereon, and that said notices, by posting and publication, in all respects complied with the statutes of this state in such cases made and provided, and were in all respects legal and sufficient, and posted and published in manner and form prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming any interest in any of the premises mentioned and described in the assessment roll heretofore confirmed in this cause and of the property therein described and assessed, and of this cause and the subject-matter thereof.

It is further ordered and adjudged by the Court that all the matters and facts stated in the said certificate filed in this cause by the said Board of Local Improvements are true; that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; that the total amount assessed for said improvement upon the public and private property does not exceed the cost of said improvement and the amount estimated to be required to pay interest on bonds and vouchers issued to anticipate collection of said assessment, and that the said assessment, as heretofore confirmed, shall not be abated or reduced.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, That the said

certificate of the said Board of Local Improvements be and the same is hereby, in all respects, approved and confirmed, and that the said assessment, as heretofore made upon the public and the private property owners, shall stand as heretofore confirmed by this Court.

Approved: \_\_\_\_\_,  
Judge.

# FORM NO. 103

## ORDER OF COURT CONFIRMING APPLICATION AND CERTIFICATE—NO OBJECTIONS—A REBATE

STATE OF ILLINOIS, } ss.  
County of \_\_\_\_\_ }

In the \_\_\_\_\_ Court,  
To the \_\_\_\_\_ Term, A. D. 19....

In the Matter of the Petition of the City of \_\_\_\_\_,  
Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
Improvement of \_\_\_\_\_  
.....

### Application and Certificate of the Board of Local Improvements on Completion of Work

And now on this ..... day of ....., A. D. 19...., this being one of the regular judicial days of the ..... Term, A. D. 19...., of said Court, comes the Petitioner herein, the Board of Local Improvements of the City of ....., Illinois, by ....., its attorney, and moves the Court, finding that all the matters and facts stated and alleged in the certificate filed herein, by said Board, are true, and that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; and this cause coming on to be heard, upon the evidence introduced by the Petitioner herein, and no objections to said application and certificate or proceedings herein, having been filed, and no defense thereto being made, and the Court being fully advised in the premises, it is adjudged by the Court that the application and certificate filed by the Petitioner herein are in all respects legal and sufficient; that notices of this hearing, as prescribed by law, were posted in at least four public places in the neighborhood of said improvement in the said City of ....., at least fifteen days prior to the time fixed for the hearing herein and hereon, and a like notice was published ("at least five successive days" or "once in each week for two successive weeks" as the case may be) in the ..... (a "daily" or "weekly" as the case may be) secular

newspaper of general circulation, regularly published in the said City of ..... for at least six months prior to the first publication of said notice; that the first publication of the notice aforesaid was had at least fifteen days prior to the time fixed by the Court for the hearing herein and hereon; that said notices, by posting and publication, in all respects complied with the statutes of this state in such cases made and provided, and were in all respects legal and sufficient, and posted and published in manner and form prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming any interest in any of the premises mentioned and described in the assessment roll heretofore confirmed in this cause and of the property therein described and assessed, and of this cause and the subject matter thereof.

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT, That judgment be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the said assessment roll and report for the said improvement as heretofore confirmed in this Court, and all persons having or claiming an interest in any of said premises.

The Court further finds and adjudges that all the matters and facts stated in said certificate filed in this cause by the said Board of Local Improvements are true; that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; that the total amount assessed for the said improvement upon the public and private property is the sum of \$.....; and that the cost of the said improvement, including the amount estimated by said Board to be required to pay interest on bonds and vouchers issued to anticipate collection of said assessment, is the sum of \$.....; and that the sum of \$..... shall be abated.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, That the said certificate of the said Board of Local Improvements be and the same is hereby, in all respects, approved and confirmed, and that the said assessment, as heretofore made upon the public and private property, as the same was heretofore confirmed by the judgment of this Court, and upon each and every lot, block, tract and parcel of land and property assessed, shall be abated and reduced proportionately to the public and to the private property owners, and shall be credited pro rata upon the respective assessments for said improvement in the amounts set forth in the hereto attached schedule, and that the said assessment be and the same is hereby confirmed as so reduced against the public, and each installment thereof, and against each lot, block, tract or parcel of land and property assessed, and each installment thereof.

IT IS FURTHER ORDERED BY THE COURT, That this judgment be certified by the Clerk of this Court to the.....of said City of.....

Approved: .....  
Judge.

NOTE:—Attach schedule of rebated assessment roll.



FORM NO. 104

ORDER OF COURT—CONFIRMING APPLICATION AND CERTIFICATE—NO OBJECTIONS—A REBATE AFTER CERTIFIED FOR COLLECTION

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of.....,  
Illinois, to Levy a Special Assessment to Pay the Cost of the Local  
Improvement of .....  
.....

Application and Certificate of the Board of Local Improvements on  
Completion of Work

And now on this.....day of....., A. D. 19...., this being one of the regular judicial days of the.....Term, A. D. 19...., of said Court, comes the Petitioner herein, the Board of Local Improvements of the City of ....., Illinois, by ....., its attorney, and moves the Court for default herein, and for the judgment of this Court, finding that all the matters and facts stated and alleged in the certificate filed herein, by said Board, are true, and that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; and this cause coming on to be heard, upon the evidence introduced by the Petitioner herein, and no objections to said application and certificate or proceedings herein having been filed, and no defense thereto being made, and the Court being fully advised in the premises, it is adjudged by the Court that the application and certificate filed by the Petitioner herein are in all respects legal and sufficient; that notices of this hearing, as prescribed by law, were posted in at least four public places in the neighborhood of said improvement in the said City of .....at least fifteen days prior to the time fixed for the hearing herein and hereon, and a like notice was published ("at least five successive days" or "once in each week for two successive weeks" as the case may be) in the ..... (a "daily" or "weekly" as the case may be) secular newspaper of general circulation, regularly published in the said City of..... for at least six months prior to the first publication of said notice; that the first publication of the notice aforesaid was had at least fifteen days prior to the time fixed by the Court for the hearing herein and hereon; that said notices, by posting and publication, in all respects complied with the statutes of this state in such cases made and provided, and were in

all respects legal and sufficient, and posted and published in manner and form prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming an interest in any of the premises mentioned and described in the assessment roll as heretofore confirmed in this cause and of the property therein described and assessed, and of this cause and the subject matter thereof.

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT, That default be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the said assessment roll and report for the said improvement as heretofore confirmed in this Court, and all persons having or claiming an interest in any of said premises.

The Court further finds and adjudges that all the matters and facts stated in said certificate filed in this cause by the said Board of Local Improvements are true, that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; that the total amount assessed for the said improvement upon the public and private property is the sum of \$. . . . . and that the cost of the said improvement, including the amount estimated by said Board to be required to pay interest on bonds and vouchers issued to anticipate collection of said assessment, is the sum of \$. . . . ., and that the sum of \$. . . . . shall be abated.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, That the said certificate of the said Board of Local Improvements be and the same is hereby, in all respects, approved and confirmed, and that said assessment, as heretofore made upon the public and private property as the same was heretofore confirmed by the judgment of this Court, and upon each and every lot, block, tract and parcel of land and property assessed, shall be abated and reduced proportionately to the public and to the private property owners, and shall be credited pro rata upon the respective assessments for said improvement.

And it appearing that said assessment has been certified for collection, pursuant to the provisions of an Act of the General Assembly of this state, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and amendments thereto, and the first installment of such assessment having become due and payable, it is ordered, adjudged and decreed that the reduction and abatement herein ordered, be and the same is hereby made pro rata upon the remaining. . . . . installments, so that said assessment, and each installment thereof, and the assessment against each and every lot, block, tract and parcel of land, and each installment thereof, shall be for the sum or sums shown and stated in the hereto attached rebated assessment roll or schedule, and that the said assessment herein be and the same is hereby confirmed as so reduced against the public and the private property assessed, and each installment thereof, and against each lot, block, tract and parcel of land and property, and each installment thereof.

IT IS FURTHER ORDERED BY THE COURT, That this judgment be certified by the Clerk of this Court to the.....of said City of .....

Approved: .....  
Judge.

NOTE:—Attach schedule.

## FORM NO. 105

### WARRANT—PLACITA FOR CERTIFICATE OF JUDGMENT OF CONFIRMATION

STATE OF ILLINOIS, } ss.  
County of .....

At a regular term of the .....Court within and for the County of .....and State of Illinois, begun and held at the Court House, in the City of....., in said County of ....., on....., the..... day of ....., A. D. 19...., it being the.....day of ....., A. D. 19...., according to the Act of the General Assembly, by the Hon. .... (one of the Judges of the.....Judicial Circuit) (if County Court change accordingly), of the State of Illinois, of which the said County of.....forms a part, ..... the following proceedings were had, to-wit:

Present:

Honorable ....., Judge.  
....., Sheriff.  
....., State's Attorney.  
....., Clerk.

## FORM NO. 106

### CERTIFICATE OF CLERK OF COURT TO ASSESSMENT ROLL AND JUDGMENT

STATE OF ILLINOIS, } ss.  
County of .....

I, ....., Clerk of the ..... Court, within and for the County of ....., and State of Illinois, do hereby certify that the above and foregoing is a true and correct copy of the judgment order of said Court, in the matter of the

petition of the City of ....., in the County of ....., Illinois, to levy a special assessment to pay the cost of the local improvement of .....Street, from ..... to .....; also a copy of the report and assessment roll as the same was confirmed in said cause; also a copy of the first voucher certificate filed herein; as fully and completely as the said several matters appear of record and on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of ....., Illinois, this ..... day of ....., A. D. 19.....

(Seal.)

.....,  
Clerk of the said.....Court.

## FORM NO. 107

### WARRANT TO COLLECTOR

STATE OF ILLINOIS,  
County of ..... } ss.

The People of the State of Illinois, to.....,  
Collector (of Special Taxes and Assessments) of the City of.....,  
Illinois:

WHEREAS, The .....Court of ..... County, Illinois, did on the.....day of....., A. D. 19.... at a regular term of said Court then held, confirm the foregoing report and assessment roll, as shown in the order of said Court, herewith duly certified, and to which this warrant is attached.

Now, THEREFORE, You are hereby commanded to make, levy and collect, in manner authorized by law and as directed in said order of said Court, as a special assessment, in installments, upon each of the foregoing described pieces and parcels of real estate, levied for the improvement therein mentioned, the several sum or sums of money, as in said order of Court directed, set opposite to the real estate, respectively, in said foregoing report and assessment roll, respectively, mentioned or described, and to proceed herein as required by law, and this shall be your sufficient warrant therefor.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of....., Illinois, this ..... day of ....., A. D. 19.....

(Seal.)

.....,  
Clerk of the said.....Court.

FORM 40

State of Illinois  
INDUSTRIAL COMMISSION OF ILLINOIS  
City Hall Square Building, Chicago, Illinois

NOTICE OF EMPLOYEE OF ACCIDENTAL INJURY AND CLAIM  
FOR COMPENSATION THEREFOR

To .....  
(Write name of employer here)

.....  
(Write address of employer here)

You will take notice that the undersigned was on the .....day of  
.....A. D. 19.., injured by an accident arising out of and in  
the course of his employment, while employed by you at.....,  
Illinois.

Name of Employee.....  
Post Office Address.....  
Relationship to claimant.....  
(State whether notice given by injured person or by dependent)

Claim for compensation is for.....  
Cause of the accident.....

Nature of the injury is as follows.....  
.....  
.....

FORM 24

State of Illinois  
INDUSTRIAL COMMISSION

PETITION FOR REVIEW OF AGREEMENT OR AWARD

.....	}	No. ....
Petitioner,		
vs.		
.....	}	
Respondent.		

Your petitioner.....of.....  
respectfully represents that on the.....day of.....19...  
at.....Illinois, an agreement (or award, as the case  
may be,) was duly made in the above entitled matter providing for the  
payment of compensation growing out of an accidental injury arising

out of and in the course of employment with.....  
of.....

Your petitioner further represents that said agreement (or award, as the case may be,) should be reviewed by your Honorable Industrial Commission upon the ground that his disability has, subsequent to the date of said agreement (or award, as the case may be,) recurred (increased, diminished, or ended, as the case may be).

(Allege what compensation has been paid, if any, and any other facts and circumstances proper for the Commission to consider under the statute upon petition for review)

Petitioner therefore prays that proper notices may be given to all parties interested under this petition for review, and that this petition may be set down for hearing at some date to be fixed by your Honorable Industrial Commission, and that upon such hearing upon review, said compensation payments as fixed in said agreement (or award, as the case may be,) may be re-established (increased, diminished or ended, as the case may be).

And your petitioner will ever pray.

.....  
Petitioner.  
.....

.....  
Attorney for Petitioner.

## FORM 69

INDUSTRIAL COMMISSION  
State of Illinois  
300 City Hall Square Bldg., Chicago, Ill.

### SETTLEMENT CONTRACT

State of Illinois, }  
..... County } ss.

..... }  
Applicant, }  
vs. }  
..... }  
Respondent. }

We, the undersigned, respectfully represent to the Honorable Industrial Commission:

First, that on ..... day of ....., 19....

(Name of person injured)  
(Address of person injured)  
(Killed or injured)

..... of ..... was .....  
in an accident that arose out of and while in the employment of

..... of  
(Name of employer)

.....  
(Address of employer)

Second, that the following statement of particulars is not binding upon the parties, if the settlement is not approved:

- (1) Place of accident.....
- (2) Description of accident and cause of injury.....

.....

- (3) State whether medical and surgical, etc., treatment required and whether furnished by employer.....

.....

- (4) Name of attending physician.....  
Address .....

- (5) Nature of injury.....

- (6) Particulars of disability, whether total or partial, and estimated duration thereof. If death resulted so state, giving date of death.....

.....

- (7) Earnings of employee.....per week (month or annum).

- (8) Amount injured person is earning, or is able to earn in some suitable employment or business after the accident.....

- (9) Payment, allowance or benefit received from employer during period of disability.....

.....

- (10) In case of death, state name, address and relationship of all dependents .....

.....

Terms of settlement.....

.....

Reasons and causes forming basis of adjustment thereof.....

In consideration of the payment of the sum of \$.....

dollars to.....in weekly installments in the sum of

\$.....dollars for a period of..... weeks

commencing the.....day of....., 19..., by

....., the employer, the

parties hereto agreed and do hereby agree to waive any and all provi-

sions of the Workmen's Compensation Act, including the right of arbi-

tration, and to settle and adjust said claim of said .....

..... against said.....

the employer, and all differences arising out of and in the said cause under

the terms of the Workmen's Compensation Act of Illinois and we hereby

mutually join in requesting your honorable body that the foregoing waiver

of the provisions of the Workmen's Compensation Act and the foregoing

contract of settlement be approved and confirmed and the parties hereto

to be discharged from further liability upon filing proper receipts; pro-

vided, however, that this agreement may be reviewed by the Industrial Commission upon petition of either party hereto as provided by paragraph (h) of section 19 of the Workmen's Compensation Act.

Dated this.....day of.....A. D., 19....

.....		.....	
Attorney for Applicant.		Applicant.	
.....		.....	
Address	Telephone	Address	Telephone
.....		.....	
Attorney for Respondent.		Respondent.	
.....		.....	
Address	Telephone	Address	Telephone

## FORM 10 (NON-FATAL CASES)

State of Illinois  
INDUSTRIAL COMMISSION

### APPLICATION FOR ADJUSTMENT OF CLAIM

Notice of Disputed Claim and Memorandum  
of Names and Addresses  
(This form to be filed in duplicate)

.....	} No.
Petitioner,	
vs.	
.....	}
Respondent.	

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the.....day of....., 192.., .....  
..... was injured by reason of an  
accident arising out of and in the course of h.....employment by the  
(Name of person injured)  
above named .....  
(Name of Employer)  
that your petitioner is the person injured.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(a) The employer denies liability for the compensation provided for in the Workmen's Compensation Act;

(b) A dispute exists concerning the amount and duration of the compensation payable.



3. The following particulars relative to this application are herewith given:

- (a) Name of injured employee.....  
Address .....
- (b) Name of employer.....  
Place of business and address.....
- (c) Place of accident.....
- (d) Nature of work upon which injured was engaged at time of accident and how caused.....  
.....
- (e) State whether medical, surgical and hospital treatment were furnished by employer and, if so, to what extent; amount expended for above purposes and period treated.....  
.....
- (f) Earnings of employee during year preceding injury, if employed by the same employer; if not so employed give earnings of such employees in the same class or grade.....  
.....
- (g) Compensation payments received from employer:  
\$.....account medical care and attendance.  
\$.....per week for.....weeks' temporary total disability.  
\$.....per week for.....weeks' partial disability.  
\$.....account of other items, here enumerated: .....

4. Additional amount claimed as compensation:

- (a) \$.....account medical care and attendance.
- (b) \$.....per week for.....weeks' temporary total disability.
- (c) \$.....for serious and permanent disfigurement to .....
- (d) \$.....per week for.....weeks' partial disability.
- (e) \$.....per week for.....weeks' loss or loss of use of.....under paragraph (e) of section 8.
- (f) \$.....per week complete and permanent disability, including pension provided for under paragraph (e) of section 8.

5. (a) Date of service on employer of notice of accident.....  
.....

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident? .....

6. Give names, ages and addresses of all children under the age of sixteen years at the time of the injury:

Name.....Address.....  
Age.....

Name.....Address.....  
 Age.....  
 Name.....Address.....  
 Age.....  
 Name.....Address.....  
 Age.....  
 Name.....Address.....  
 Age.....

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this.....day of....., 192...

(Signed).....  
 Address.....

.....

Attorney for Petitioner.

Address.....

## FORM 20

### State of Illinois INDUSTRIAL COMMISSION

State of Illinois, }  
 ..... County } ss.

..... }  
 Petitioner, }  
 vs. }  
 ..... }  
 Respondent. }

### PETITION FOR REVIEW OF DECISION OF ARBITRATOR

Now comes.....of.....  
 and respectfully petitions the Honorable Industrial Commission of the State of Illinois as follows:

The said Commission shall review the decision of the Arbitrator, duly appointed according to law, in the matter of.....

vs. .... which decision of said Arbitrator was filed with the Industrial Commission on the.....day of .....19....

Petitioner presents herewith.....of the proceedings before said Arbitrator upon the hearing hereof (or stenographic report of proceedings, as the case may be).

Petitioner further represents that said decision of the Arbitrator should be reviewed by the Industrial Commission, for the following additional reasons, to-wit: (Set up any proper ground for review, in accordance with Sec. XIX.)

Petitioner therefore prays that proper notice in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this petition for review, and that upon such hearing said Commission may modify or vacate the order and decision of the Arbitrator, as in the opinion of said Commission the facts and circumstances shall warrant.

And your petitioner will ever pray.

(Employer or employee, as the case may be)

Attorney for Petitioner.

## FORM 10-A (FATAL CASES)

State of Illinois  
INDUSTRIAL COMMISSION

### APPLICATION FOR ADJUSTMENT OF CLAIM

Notice of Disputed Claim and Memorandum of  
Names and Addresses

(This form to be filed in duplicate.)

....., Administrat....	} No.
of the Estate of.....	
deceased, .....	
vs. ....	
.....	Petitioner,
.....	Respondent.

The petition of the undersigned respectfully shows to this Honorable commission the following, to wit:

1. That on the.....day of....., 19...,  
.....received an injury by reason of  
(Name of person killed)  
an accident arising out of and in the course of h..... employment by

the above named.....which injury resulted in  
 (Name of employer)  
 the death of said employee on, to wit, the.....day of.....,  
 19...; that your petitioner is the administrat.... of said deceased.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(a) The employer denies liability for the compensation provided for in the Workmen's Compensation Act;

(b) A dispute exists concerning the amount and duration of the compensation payable.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee.....  
 Address .....

(b) Name of employer.....  
 Place of business and address.....

(c) Place of accident.....

(d) Nature of work upon which injured was engaged at time of accident and how caused.....

(e) State whether medical, surgical.....  
 and hospital treatment were furnished .....  
 by employer and, if so, to what extent; .....  
 amount expended for above purposes .....  
 and period treated. ....

(f) Earnings of employee during .....  
 year preceding injury, if employed by .....  
 the same employer; if not so employed, .....  
 give earnings of such employees in the .....  
 same class or grade. ....

(g) Compensation payments received from employer:  
 \$.....account medical care and attendance.  
 \$.....per week for.....weeks' temporary  
 total disability.  
 \$.....per week for.....weeks' partial dis-  
 ability.  
 \$.....account of other items, here enumerated:.....

5. (a) Date of service on employer of notice of accident.....

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident .....

(Fill out only one of the following tables indicating which paragraph of Section 7 compensation is claimed under.)

6. The deceased left him surviving:

(a) A widow:

Name ..... Address .....  
 Children (give names, addresses and ages):  
 Name ..... Address .....  
 Age.....  
 Name ..... Address .....  
 Age.....  
 Name ..... Address .....  
 Age.....  
 Name ..... Address .....  
 Age.....  
 Name ..... Address .....  
 Age.....

whom he was under legal obligation to support.

(b) Parent or parents totally dependent upon the earnings of deceased at the time of the injury:

Name ..... Address .....

(c) Parent, grandparent or grandchild partially dependent upon the earnings of the deceased at the time of the injury and the respective dependencies:

Name ..... Address .....  
 Dependency.....  
 Name ..... Address .....  
 Dependency.....  
 Name ..... Address .....  
 Dependency.....

(d) Collateral heirs dependent upon the deceased at the time of the injury and the average annual contributions during the two years preceding the injury resulting in death:

Name ..... Address .....  
 Contribution.....  
 Name ..... Address .....  
 Contribution.....  
 Name ..... Address .....  
 Contribution.....

(e) If no widow or heirs survive give amount of funeral expenses:

.....

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party

whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this.....day of....., 19...

(Signed).....

Administrat...., etc.

Address.....

Attorney for petitioner.

Address.....

## FORM 28

### EMPLOYER'S OR BENEFICIARY'S PETITION FOR LUMP SUM

State of Illinois, }  
..... County } ss.

.....	} Before the Industrial Commission of Illinois
Petitioner,	
va.	
.....	} Respondent.
Respondent.	

Now comes.....  
petitioner herein, and respectfully represents that.....he is (or, in death cases, say "the deceased employe was") and was on the.....  
day of....., 192.., an employe in the service of.....  
..... an employer  
at....., in the City of.....  
Illinois; that both said employer and said employe were working under  
and subject to the provisions of the Workmen's Compensation Act, and  
that on, to-wit: The.....day of....., 192.., said  
employe was injured, as a result of which.....

(Here state the nature of the injury as "right arm was amputated between elbow and wrist" or "employe died")

Petitioner further shows that said employer has paid compensation on account of said injury (or death) as follows: (State what has been paid, and in what installments, and if no compensation has been paid, so state.)

.....  
Petitioner further shows that employe earned as wages the sum of \$.....per week (month or annum); that under the provisions of the Workmen's Compensation Act, petitioner is entitled to compensation at the rate of \$.....per week for a period of.....weeks.  
(In case of death the average annual wage and say that four times the average annual wage amounts to the sum of \$.....).

(In death cases add: Petitioner further shows that.....he is a

dependent of said employe, in this, that.....he is the surviving widow (child, children, as the case may be) with whom said employe lived at the time of his death, and whom he was under legal obligations to support; or in case of parents, grandparents or other lineal heirs, state that said employe contributed to petitioner's support within four years previous to the time of said injury; if the petition is presented by an administrator or executor, allege that petitioner is the duly qualified and acting administrator or executor, as the case may be, of said deceased employe.)

Petitioner further shows that.....he believes it to the best interest of the parties that compensation now due and to become due be paid in a lump sum, for the following reasons: (Set them out, showing necessity for such payment, and proper anticipated use of the money, etc.)

Petitioner therefore respectfully prays that proper notices may be given to the interested parties, and particularly to said employer.....

....., Illinois, and that a hearing may be had at some day to be fixed by your Honorable Commission, and that upon such hearing said Commission may order the commutation of the compensation to an equivalent lump sum equal to the total sum of the probable future payments capitalized at their present value upon a three per cent basis with annual rests in accordance with the provisions of the Workmen's Compensation Act.

And your petitioner will ever pray.

.....  
Petitioner.

.....  
Address.

.....  
Attorney for Petitioner.

.....  
Address.

# EMPLOYER'S ASSENT TO THE ENTRANCE OF LUMP SUM ORDER

State of Illinois, }  
..... County } ss.

I (or we), .....  
.....  
the employer hereinbefore referred to (or an agent may say "representative of"), hereby indicate our willingness to pay the compensation hereinbefore mentioned, commuted in accordance with Section 9 of the Workmen's Compensation Act, if so ordered by the Industrial Commission of Illinois.

.....  
Post Office Address.....

.....  
(Give street and number as well as city or town)

**(INSTRUCTIONS.)**

Petitions should be prepared with ink in clear, legible handwriting, or typewritten if practicable.

All information should be given as indicated in the various parts of the form.

The assent of the employer must be signed by him or his authorized agent, AND NOT BY THE EMPLOYEE OR HIS REPRESENTATIVE.

Failure to furnish all the information required will result in delay in having the petition considered.

## PRAECIPE UNDER WORKMEN'S COMPENSA- TION ACT

State of Illinois, } ss.  
County of }

CIRCUIT COURT OF \_\_\_\_\_ COUNTY  
.....Term, A. D. 19...

.....  
.....  
vs. } General Number .....  
.....  
.....  
.....

The Clerk of said Court will issue a writ of certiorari in accordance with the provisions of the Workmen's Compensation Act, to the Industrial Commission of Illinois, directing said Commission to certify to this Court a transcript of the decision, award and other proceedings, rendered on the .....day of.....A. D. 19..., for the sum of.....  
.....  
in the above entitled cause on or before the third Monday of.....  
A. D. 19..., and the Clerk of the said Court will also issue a writ of scire facias in said cause to the aforesaid petitioner or applicant and direct same to the Sheriff of Cook County to execute and make it returnable to the.....Term of said Court, A. D. 19....

**Attorney.**

To AUGUST W. MILLER, Clerk,  
Chicago, ..... A. D. 19....



## CHAPTER XXII

### STATUTES

#### CANONS OF CONSTRUCTION

**Constitution.** The constitution of the state is a restraint of power and not a grant of power.<sup>1</sup>

**Statutes, when mandatory.** The word "shall" in a statute may be held to be used as *directory*, merely, when no advantage is lost, no right destroyed, or benefit sacrificed either to the public or individuals by such construction.<sup>2</sup>

#### REPEAL BY IMPLICATION

**Statutes, repeal by implication.** An ordinance was passed March 18, 1889, by the Village of Washington Heights before its annexation to Chicago, for laying water pipes. Point was made that the county court had no jurisdiction to enter judgment of confirmation because the ordinance was void.

**Held:** The Act of March 17, 1874, providing for the "laying of water supply pipes by bonds and special assessments payable in instalments" was repealed by conflicting Act of April 19, 1887, amending the act relating to cities and villages, by providing for payment for public improvements by instalments.

**Court says:** "When two inconsistent acts are passed at different times, and the provisions of both cannot be

1—*Sawyer v. Alton, City of*, 3 24 Ill. 105 (R. R.). Also: *Fowler v. Perkins*, 77 Ill. 271 (R. R.); *Scam. 127 (Af.)*.

2—*Wheeler v. Chicago, City of*, *O'Rear v. Crum*, 135 Ill. 294 (Af.).

carried into effect, the later law must prevail, and the first must give way.”<sup>3</sup>

“The doctrine is, that inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute, and unless those rights have become so far perfected as to stand independent of the statute.”<sup>4</sup>

When two statutes taken together cannot stand, a later statute repeals a former one. “An affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary thereto.”<sup>5</sup>

Acts seemingly repugnant should be so construed that the latter may not operate as a repeal of the former by implication.<sup>6</sup>

#### COMMON LAW CHANGES

It is a general rule that statutes are not to be presumed to alter the common law further than they expressly declare. Construction strict.<sup>7</sup>

In a case in ejectment the court said: “By the common law a judgment in ejectment was not conclusive upon the title of either of the parties to the record; but an innovation has been made by the statute upon this rule of the common law.”<sup>8</sup>

3—Devine v. Board of Commissioners of Cook Co., 84 Ill. 590 (R.). Also: People v. Nelson, 156 Ill. 364 (Af.); People ex rel. v. Board of Education of City of Centralia, 166 Ill. 388 (R. R.).

4—Butler v. Palmer, 1 Hill. 324. “This is to say executed.” Also: Van Inwagen v. Chicago, City of, 61 Ill. 31 (R. R.).

5—Sullivan v. The People, 15 Ill. 233 (Af.). Also: Harding v. Rockford, R. I. & St. L. R. R. Co. et al., 65 Ill. 90 (R. R.).

6—Ottawa, Town of v. La Salle Co., 12 Ill. 339 (R.). Also: Supervisors et al. v. Campbell et al., 42 Ill. 490 (Af.); East St. Louis, City of v. Maxwell, 99 Ill. 439 (Af.); Ridgway et al. v. Gallatin et al., County of, 181 Ill. 521 (Af.); People ex rel. v. Murphy, 202 Ill. 493. Motion denied.

7—Huntington v. Barton, 64 Ill. 502 (Decree R.).

8—Cadwallader v. Harris, 76 Ill. 370 (Af.).

In February, 1818, an act was passed declaring the common law a rule of decision.<sup>9</sup>

Again the court held: "It is a familiar rule of construction that a statute is not to be construed as changing the common law further than it is expressly declared." <sup>10</sup>

Statutes that confer special power to be exercised not according to the course of the common law, must be strictly construed. This rule is to be applied when courts of general jurisdiction exercise, by virtue of a statute, special powers.<sup>11</sup>

#### FOREIGN STATUTES—PRESUMPTION WHEN ADOPTED

When one state enacts a statute of another state, it is presumed to adopt the construction which that statute has received by a uniform series of judicial expositions.<sup>12</sup>

Exception. This presumption will be indulged when the foreign statute has received a construction at the time of its adoption.<sup>13</sup>

#### RETROSPECTIVE OPERATION

The rule is inflexible that no statute will be so construed as to give a retrospective operation, unless such an intention is manifested by a clear and unequivocal expression.<sup>14</sup>

9—Thompson v. Weller, 85 Ill. 197 (Af.).

10—Canadian Bank v. McCrea et al., 106 Ill. 281 (Af.). Also: Smith et al. v. Leatch et al., 114 Ill. 271 (R. R.); Mackin v. Haven, Trustee et al., 187 Ill. 480 (Af.).

Rule of strict construction relaxed. See Meadowcroft et al. v. People, 163 Ill. 56 (Af.).

11—Keegan v. Geraghty et al., 101 Ill. 26 (Af.). Also: Watts v. Dull et al., 184 Ill. 86 (Af.).

12—Campbell v. Quinlin, 3 Seam. 288 (Af.). Also: Riggs et al. v. Wilton et al., 13 Ill. 15 (R. R.); Prettyman et al. v. Wilkey et al., 19 Ill. 235 (Af.); Streeter v. People, 69 Ill. 595 (Af.); Gage v. Smith et al., 79 Ill. 219 (Af.); ReQua et al. v. Graham, Adm., 187 Ill. 67 (Af.).

13—Rhoads et al. v. Chicago & Alton R. R. Co., 227 Ill. 328 (Af.).

14—Robinson v. Rowan, 2 Seam. 499 (Af.). Also: Bruce v. Schuyler et al., 4 Gil. 221 (Af.); Thomson v.

Rule does not apply to statutes giving a new remedy.<sup>15</sup>

When practical a whole act or section will be read together and so construed as to make it harmonious and consistent.<sup>16</sup>

The Thompson case is important on the subject of the lien of judgments of the federal court, and the lien of transcripts from justices of the peace, under the Act of 1889, page 195.<sup>17</sup>

Statutes exempting property must be strictly construed.<sup>18</sup>

The rules for construction of an ordinance are the same as those applied to the construction of a statute.<sup>19</sup>

#### RULE WHEN PART OF STATUTE IS VOID

"It is a general rule, and one founded in good sense, that if one part of a statute be unconstitutional, but it stands so independently by itself that it may be rejected, and yet leave that which remains so complete in itself as to be fully capable of execution, then the act should be construed the same as if the void part had never been inserted." <sup>20</sup>

Alexander, 11 Ill. 54 (Af.); Marsh v. Chestnut, 14 Ill. 223 (R. R.); Conway v. Cable et al., 37 Ill. 82 (R. R.); Deininger et al. v. McConnell, 41 Ill. 227 (R. R.); In re Tuller, 79 Ill. 99 (R. R.); People ex rel. v. Peacock, 98 Ill. 172 (Af.).

15—Biggins v. People of State of Illinois, 106 Ill. 270 (D. Af.); Drainage Dist. v. Benson et al., 125 Ill. 490 (R. R.); Gage v. Nichols, 135 Ill. 128 (Af.); Bauer Grocer Co. v. Zelle, 172 Ill. 407 (R. R.).

16—Mechanics Savings Inst. of St. Louis et al. v. Givens et al., 82 Ill. 157 (R. R.).

17—Rock Island Nat. Bank v. Thompson, 173 Ill. 593 (Af.). Also: Richardson v. U. S. Mort. & Trust

Co., 194 Ill. 259 (Af.); McCartney v. The People, 202 Ill. 53; Walker v. People ex rel., 202 Ill. 34 (Af.); Cleary et al. v. Hoobler et al., 207 Ill. 97 (R. R.); Eddy et al. v. Morgan et al., 216 Ill. 437 (R. R.); People ex rel. v. Lower et al., 236 Ill. 608 (Af.); White Sewing Machine Co., Appellant v. Harris et al., 252 Ill. 361 (R.).

18—Sanitary Dist. of Chicago v. Hanberg, 226 Ill. 480 (R. R.).

19—People ex rel. v. Hummel, City Treas., 215 Ill. 43 (Writ denied).

20—Myers v. The People, 67 Ill. 503 (Af.). Also: Chicago, City of v. Wolf et al., 221 Ill. 130 (Af.).

The quo warranto case of Cornell

## STATUTES—NEW REMEDIES

When a statute gives a new remedy and contains no word negating the old one, the new one is cumulative.<sup>21</sup>

## STATUTES—RETROACTIVE EFFECT

Statutes may have a retroactive effect when they apply only to the remedy.<sup>22</sup>

Where there is no saving clause as to existing litigation, all right of action will be enforced under the new procedure.<sup>23</sup>

v. *People ex rel.*, 107 Ill. 372 (Af.), is important on the point that the act of the legislature, taking the power of appointing a park commissioner from a judge is unconstitutional. Both Secs. 1 and 2 of the Act of 1881 are unconstitutional.

See *Gauen et al. v. Moredock & Ivy Landing Drain. Dist.*, 131 Ill. 446 (R. R.), as to the rule when statutes are passed at the same session of the legislature.

“Statutes must be interpreted according to the intent and meaning, and not always according to the letter. A thing within the intention is within the statute, though not within the letter; and a thing within the letter is not within the statute, unless within the intention.” Quoted

from page 220, *Perry Co. v. Jefferson Co.*, 94 Ill. 214 (R. R.).

21—*C. & N. W. Ry. Co. v. Chicago, City of*, 148 Ill. 141 (Af.). Also: *Mackin v. Haven, Trustee, et al.*, 187 Ill. 480 (Af.); *Maxwell v. People*, 189 Ill. 546 (R. R.).

22—*Wood et al. v. Child et al.*, 20 Ill. 209 (R. R.).

23—*Illinois Cent. R. R. Co. v. Wenona, City of*, 163 Ill. 288 (R. R.). Also: *Springfield & Ill. South. Ry. Co.*, 67 Ill. 99 (Af.); *Winalow v. People*, 117 Ill. 152 (Af.); *Chi. & W. Ind. R. R. Co. v. Guthrie et al.*, 192 Ill. 579 (Af., important case on Sec. 10, *Eminent Domain*, 1897, page 218); *Woods v. Soucy*, 166 Ill. 407 (Af., Secs. 8, 9, 10, *Landlord and Tenant Act*).

## CHAPTER XXIII

### STATUTORY REVIEW OF VERDICTS<sup>1</sup>

#### EX CONTRACTU—VERDICTS SET ASIDE

When a verdict is contrary to the evidence, or where there is no evidence to support it, it will be set aside.

In further expansion of this proposition, the court observes, in support of its act in setting aside a verdict:

The defendant under a plea of set-off got a judgment of six cents. All the evidence was preserved.<sup>2</sup>

Strong preponderance of testimony against the verdict; all the evidence in the bill.<sup>3</sup>

All the evidence is in the bill, and it does not warrant the verdict.<sup>4</sup>

Court: Jury either mistook or misunderstood the evidence.<sup>5</sup>

Here the court says: "Such (ex contractu) cases furnish of themselves the rule, and whenever juries transgress it, their verdicts should unhesitatingly be set aside."<sup>6</sup>

Court says: "The evidence in this cause is so strong in favor of the defendant below, as to cause a well

1—See Foreword. Referring to the statute of 1837.

2—Scott (Plaintiff) v. Blum et al., 2 Gil. 595 (R. R.).

3—Chase v. Debolt, 2 Gil. 371 (R. R.).

4—Culbertson v. Galena, City of, 2 Gil. 129 (R. R.).

5—Gordon v. Crooks, 11 Ill. 142 (R. R.).

6—Fish et al. v. Roseberry, 22 Ill. 288 (R. R.).

Kergin v. Dawson, 1 Gil. 86 (R. R.); Eldridge v. Rowe (Plaintiff), 2 Gil. 91 (R. R.); Keagy v. Hite, 12 Ill. 99 (R. R.); Schwab v. Gingerick, 13 Ill. 697 (R. R.); Baker v. Pritchett, 16 Ill. 56 (R. R.).

grounded apprehension, either that the jury did not understand it, or sympathised so strongly with the plaintiff, as to prevent their receiving and appreciating the force of it.”<sup>7</sup>

Assumpsit; judgment for defendant. Court: “A material averment in the declaration not proven; all the evidence is preserved in the record; the verdict cannot be sustained.”<sup>8</sup>

Court says: “A careful examination of the evidence in this case, we think shows that it is too loose, indefinite, and unsatisfactory in its character to sustain the verdict. And the court below, therefore, erred in overruling the motion for a new trial.”<sup>9</sup>

Court: Assumpsit; judgment for plaintiff. “On a careful examination of the record, we cannot find a particle of evidence going to sustain the verdict. At ‘first blush,’ the injustice of it is apparent. There being no evidence to support the verdict, it should have been set aside on defendant’s motion, and a new trial awarded.”<sup>10</sup>

Assumpsit; verdict for the plaintiff. Court: “The verdict is not sustained by the evidence.”<sup>11</sup>

Assumpsit; error assigned; verdict contrary to evidence.<sup>12</sup>

Verdict \$3,411.60; result of prejudice and passion.<sup>13</sup>

Assumpsit for plaintiff. “This court has never hesitated in actions ex contractu to set aside verdicts, where it appears from the record, the jury have mistaken the

7—Boyle v. Levings, 24 Ill. 223 (R. R.).

8—Lassen v. Mitchell, 41 Ill. 101 (R. R.).

9—McCarthy v. Mooney, 41 Ill. 300 (R. R.).

10—Chicago & Great Eastern Ry. Co. v. Fox et al., 41 Ill. 106 (R. R.).

11—Kime v. Kime, 41 Ill. 397 (R. R.).

School Inspectors of Peoria v. Hughes, 24 Ill. 231 (R. R.); Clement v. Bushway et al., 25 Ill. 200 (R. R.); Gentleman v. Soule, 32 Ill. 271 (R. R.); Henry v. Eddy, 34 Ill. 508 (R.); Lopping et al. v. Maxe, 39 Ill. 159 (R. R.).

12—Southworth v. Hoag, 42 Ill. 446 (R. R.).

13—Lockwood et al., Executors v. Onions, 48 Ill. 325 (R. R.).

evidence or found against its clear preponderance. In actions *ex delicto* the rule is more strict.”<sup>14</sup>

Action of *assumpsit*; verdict manifestly against the weight of evidence.<sup>15</sup>

#### EX CONTRACTU—REFUSAL OF COURT TO SET ASIDE VERDICT

The position of the court when there has been a refusal to set aside a verdict is stated:

*Assumpsit*; verdict of jury \$335. \$246 remitted. Motion for a new trial overruled and judgment on the verdict. All evidence is in the record. Overruling motion is the only error assigned. “We are not trying the case as a jury, and are not at liberty to substitute our own views for theirs. The only question for us to determine is: was there evidence sufficient to justify the finding, and this question we must answer in the affirmative. Besides many circumstances may have been disclosed on the trial in various ways, which, though they transpired, can rarely ever find their way into the record as it is presented to an appellate court, and which may have added great weight to the testimony in ques-

14—*Dalton v. Clough*, 50 Ill. 47 (R. R.).

15—*Reynolds v. Lambert et al.*, 69 Ill. 495 (R. R.).

*Corey v. McDaniel*, 42 Ill. 512 (R. R.); *Koester v. Esslinger*, 44 Ill. 476 (R. R.); *Tilley v. Spalding*, 44 Ill. 80 (R. R.); *Nickle v. Wilkinson*, 44 Ill. 48 (R. R.); *Giberson v. Webster*, 44 Ill. 483 (R. R.); *Ray v. Bullock*, 46 Ill. 64 (R. R.); *Keith v. Fink*, 47 Ill. 272 (R. R.); *Maynz v. Zeigler*, 49 Ill. 303 (R. R.); *Ammerman v. Teeter*, 49 Ill. 400 (R. R.); *Haycroft v. Davis*, 49 Ill. 455 (R. R.); *Crabtree et al. v. Ferguay*, 49 Ill. 520 (R. R.); *Hayes v. Moy-*

*nihan*, 52 Ill. 423 (R. R.); *Mamlin v. Martin*, 56 Ill. 315 (R. R.); *Janney v. Birch, Adm.*, 58 Ill. 87 (R. R.); *Wade v. Atkins, et al.*, 58 Ill. 64 (R. R.); *Broughton v. Smart*, 59 Ill. 440 (R. R.).

*Kuhner v. Griesbaum*, 59 Ill. 48 (R. R.); *Lincoln v. Stowell*, 62 Ill. 84 (R. R.); *Schwartz v. Hammers*, 63 Ill. 500 (R. R.); *Knott v. Skinner*, 63 Ill. 239 (R. R.); *St. Paul Fire and Marine Ins. Co. v. Johnson*, 77 Ill. 598 (R. R.); *Hale et al. v. Johnson*, 80 Ill. 185 (R. R.); *Belden v. Innis*, 84 Ill. 78 (R. R.); *Williams v. Reynolds*, 86 Ill. 263 (R. R.).



tion. It was the privilege of the jury to let these circumstances enter into their consideration." <sup>16</sup>

Further the court says:

Assumpsit; verdict \$55. Bill contains all testimony. Weight of testimony in favor of verdict. Court: "It is only in cases where the verdict of the jury strikes the mind at 'first blush' as manifestly and palpably contrary to the evidence, that the court will for that reason interfere to set it aside." <sup>17</sup>

Action for goods furnished wife. Verdict for \$54.04. Motion for new trial. Court: "The evidence was inconclusive and contradictory, and the jury having passed upon it, we perceive no good reason for disturbing their verdict." <sup>18</sup>

Assumpsit; verdict \$391.39. Court: "If the court can see that the jury was warranted by the evidence in inferring a state of case that would sustain the action, it is bound to uphold the judgment, even though it would be of the opinion that there was slight preponderance of evidence against the finding." <sup>19</sup>

Action on promises; judgment for plaintiff. Court: Evidence carefully considered; not prepared to say that the evidence is against the verdict, or weight of evidence. <sup>20</sup>

Assumpsit; verdict for defendant. Court says: Jury "might, without a manifest disregard of the evidence, have found either way, and in such case, a verdict will not be set aside for the reason simply, that the evidence might incline the mind of the court to a different result." <sup>21</sup>

16—Jenkins v. Brush, Appellee, 3 Gil. 18 (Af.).

17—Dawson v. Robbins, 5 Gil. 72 (Af.).

Allen v. Smith et al., 3 Scam. 97.

18—Evans v. Fisher et al., 5 Gil. 569 (Af.).

19—Bloomer v. Denman, 12 Ill. 240 (Af.).

20—Welden v. Francis, 12 Ill. 460 (Af.); Sullivan v. Dollins, 13 Ill. 85 (Af.).

21—Green v. Lewis, 13 Ill. 642 (Af.).

Assumpsit; verdict for plaintiff, \$270. Court: "If the jury were not absolutely bound to find the way they did, the finding is not so unsupported by the evidence, as to justify this court in disturbing it." <sup>22</sup>

Suit on an account; verdict \$84.11. Court: "There is in the case a conflict between the statements of witnesses in regard to some of the material facts, and it was for the jury, from all the surrounding circumstances, to reconcile them if they could. \* \* \* From the evidence in the case, it does not appear that the finding was clearly and palpably against the weight of evidence, and unless it were so, we would not be justified in disturbing it; and we are of the opinion that the evidence did justify the verdict." <sup>23</sup>

Evidence contradictory. <sup>24</sup>

Conflicting testimony. <sup>25</sup>

Assumpsit; verdict \$125. Evidence conflicting. <sup>26</sup>

Conflict of evidence. <sup>27</sup>

"Where it is apparent that the jury have misapprehended the force of the evidence, or, where the verdict is manifestly wrong, it is the duty of the court to re-examine the evidence. To that extent we will look into the evidence, but no further. But where there is testimony of equal credibility on both sides, as in this case, on similar questions of fact, we must rely on the verdict as presenting the true conclusion to be drawn from the evidence. Any other rule would require this court to sit here for an indefinite period and investigate cases in the capacity of jurors." <sup>28</sup>

Presumption in favor of verdict. <sup>29</sup>

22—*Dufield v. Cross*, 13 Ill. 699 (Af.).

23—*Archdale v. Moore et al.*, 19 Ill. 565 (Af.).

24—*Bush v. Kindred*, 20 Ill. 93 (Af.).

25—*Martin et al. v. Ehrenfels*, 24 Ill. 187 (Af.).

26—*Cross v. Carey*, 25 Ill. 562 (Af.).

27—*S. L. J. & C. R. Co. v. Terhune*, 50 Ill. 152 (Af.).

28—*Wilson v. Bevans*, 53 Ill. 354 (Af.).

29—*Chapman v. Stewart*, 63 Ill. 332 (Af.).

Evidence preponderates in favor of verdict.<sup>30</sup>

"Except in cases where the verdict is manifestly against the weight of evidence, or where it plainly appears to be the result of passion and prejudice, we are always reluctant to disturb the finding of the jury upon the facts."<sup>31</sup>

Court says: "Where the evidence is conflicting, we have often said we will not disturb the verdict."<sup>32</sup>

Court: "The jury, under the law, have the exclusive right to pass upon and determine the weight of evidence and find the facts. At common law that finding was not subject to be reviewed in an appellate court. The judge trying the case was entrusted with the power to grant a new trial if he believed the evidence did not sustain the finding; that if the jury, from prejudice, passion or misapprehension of the evidence, found a verdict manifestly against its weight, the judge could thus prevent injustice and wrong by submitting the case to another jury. The judge trying the case had the same opportunity to see and hear the witnesses, and to estimate the character of their testimony, as the jury, hence there was a fitness in his being required to pass upon it on a motion for a new trial. But an appellate court neither sees nor hears the witnesses testify and only sees the testimony on paper, where it all appears alike.

\* \* \* From these considerations it is apparent that

30—Gill v. Crosby, 63 Ill. 190 (Af.).

31—Twining v. Martin, 65 Ill. 157 (Af.).

French v. Lowry, 19 Ill. 158 (Af.); Ill. Cent. R. R. Co. v. Hays et al., 19 Ill. 166 (Af.); Carpenter v. Ambrosen, 20 Ill. 170 (Af.); Morgan v. Byerson, 20 Ill. 343 (Af.); Goodell v. Woodruff, 20 Ill. 191 (Af.); Bush v. Kindred, 20 Ill. 93 (Af.); Pullian v. Ogle, 27 Ill. 189 (Af.); Umlauf v. Bassett, 38

Ill. 96 (Af.); Davis v. Hoepaer, 44 Ill. 306 (Af.); C. & G. Eastern Ry. Co. v. Vosburgh, 45 Ill. 311 (Af.); McKichan et al. v. McBean, 45 Ill. 228 (Af.); DeCler v. Vumgen, 46 Ill. 112 (Af.); Keith v. Fink, 47 Ill. 272 (Af.); Brown v. Berry, 47 Ill. 175 (Af.); Young v. Rock, 48 Ill. 42 (Af.); Union H. & L. Co. v. Shoemann, 48 Ill. 74 (Af.).

32—Clifford v. Luhring et al., 69 Ill. 401 (Af.).

we should be cautious in the exercise of the power conferred upon us by the statute, to reverse because the finding is not supported by the evidence. In all such cases the presumption is that the jury have done their duty and found correctly. \* \* \* We must, therefore, leave the question of the credibility and worth of evidence where the law has placed it, with the jury, and decline to disturb the finding in this case. The verdict does not appear to us clearly and palpably against the evidence.”<sup>33</sup>

Debt. Court: “Where there is such a contrariety of evidence as is shown in this record, and the jury have been properly instructed, as they were in this case, we must rely upon the verdict as settling the controverted facts.”<sup>34</sup>

Court says that “the evidence is conflicting and seems not to be entirely satisfactory. The trial judge saw witnesses, and we should not lightly disregard his decision.”<sup>35</sup>

Verdict \$640.26. Two trials had. Court: “Questions of fact have been submitted to two juries. The first failed to agree, but the second found the issues for appellee. This fact indicates that the finding is not manifestly against the evidence. It may show that there is some doubt—but not that it is clearly wrong.”<sup>36</sup>

Assumpsit; credibility of witnesses is a question for the jury.<sup>37</sup>

33—Bishop v. Busse et al., 69 Ill. 403 (Af.).

Chillicothe T. R. & B. Co. v. Jameson et al., 48 Ill. 281 (Af.); First National Bank of Woodstock v. Mansfield, 48 Ill. 494 (Af.); Thompson v. Anthony, 48 Ill. 468 (Af.); O'Brien v. Palmer, 49 Ill. 72 (Af.); Jacquin v. Davidson, 49 Ill. 82 (Af.); McCarthy v. Mooney, 49 Ill. 247 (Af.); Calhoun v. O'Neil

et al., 53 Ill. 354 (Af.); O'Neill et al. v. Calhoun, 67 Ill. 219 (Af.)

34—Simons v. Waldron et al., 70 Ill. 281 (Af.).

35—Wiggins Ferry Co. v. Higgins, 72 Ill. 517 (Af.).

36—Chapman v. Burt, 77 Ill. 337 (Af.).

37—Hunter et al. v. Hartscock, 79 Ill. 14 (Af.).

Court: "The evidence all considered, it is not clear and certain the verdict is right, but at the same time, it does not impress the mind that it is manifestly wrong, and we can only reverse where the preponderance is clearly against the verdict. It is apparent to all, that the jury and the judge trying the case have advantages superior to ours for ascertaining the truth, by estimating the worth of the evidence." Here it was sought to impeach the verdict by a bailiff who swore that each juror set down what he was in favor of finding, and the sum added, divided by twelve, was adopted as a verdict. The affidavits of the jurymen showed that there was no prior agreement that the sum thus found should be taken as a verdict, and in fact in this case it was not, but a less sum was found. Held that the verdict was not vitiated." <sup>38</sup>

Suit upon note. Court: "Irreconcilable conflict in the evidence." <sup>39</sup>

Controversy about the value of services. Court: "On looking into the evidence it is found conflicting on every point of disagreement between parties, and we cannot undertake to reconcile it. That was the province of the jury. Under our law, either party has the right to have the cause tried by a jury, and where questions of fact upon which the testimony is conflicting are submitted under proper instructions from the court, some consideration must be shown to the finding, otherwise the right of trial by jury, secured by law, would be a barren right." <sup>40</sup>

Assumpsit; idem holding and idem remark.<sup>41</sup>

Divorce; evidence conflicting.<sup>42</sup>

38—Papineau v. Belgrade, 81 Ill. 61 (Af.).

39—Corwith v. Colter, 82 Ill. 585 (Af.).

Mer.'s L. & T. Co. v. Goodrich, 75 Ill. 337 (Af.)

40—Bell v. Gordon, 86 Ill. 501 (Af.).

41—Stickle v. Otto, 86 Ill. 161 (Af.).

42—Moore v. Idem, 88 Ill. 98 (Af.).

Will case; verdict sustaining will. Court: "The evidence is voluminous and is conflicting, and portions seem irreconcilable." <sup>43</sup>

Action of ejectment sole ground relied upon to reverse is that the verdict was contrary to the evidence. Court: "A verdict of a jury will not be set aside where the evidence is conflicting unless clearly against the evidence." <sup>44</sup>

Will case. <sup>45</sup>

Will case. When the testimony is conflicting, the finding is conclusive unless it is clearly against the weight of the evidence. <sup>46</sup>

Will case. <sup>47</sup>

CONDEMNATION CASES—REFUSAL OF COURT TO SET ASIDE  
VERDICT WHEN JURY VIEW THE PREMISES

Reversed upon an erroneous instruction. <sup>48</sup>

Reversed upon an erroneous instruction. <sup>49</sup>

In a special assessment case the question of benefits was submitted to a jury, who viewed the premises, and the court, though reversing upon another point, observes: "The rule in this class of cases should be at least as favorable in support of the verdict of the jury as in cases of eminent domain where the jury view the premises, and in the latter class of cases it is well established that the verdict will not be disturbed, on appeal, on the

43—Buchanan et al. v. McLennan et al., 105 Ill. 56 (Af.).

44—Green v. Mumper, 138 Ill. 434 (Af.).

45—Calvert v. Carpenter et al., 96 Ill. 63 (Af.).

46—Bevelot v. Lestrade, 153 Ill. 625 (Af.).

47—Harp et al. v. Parr et al., 168 Ill. 459 (Af.).

Foss et al. v. Sabin, 84 Ill. 564

(Af.); Davis et al. v. Mitchell, 93 Ill. 593 (Af.); Carter v. Carter, 152 Ill. 434 (Af.); Taylor et al. v. Cox et al., 153 Ill. 220 (Af.); Entwistle et al. v. Meikle et al., 180 Ill. 9 (Af.).

48—Chicago & Evanston R. R. Co. v. Jacobs, 110 Ill. 414 (R. R.).

49—Chicago, Bur. & Quincy R. R. Co. v. Naperville, City of, 166 Ill. 87 (R. R.).

ground that it is contrary to the evidence, where the jury viewed the premises, the evidence was conflicting, and the verdict is within the range of testimony and does not appear to be the result of passion or prejudice." <sup>50</sup>

Evidence conflicting.<sup>51</sup>

Reversed because this instruction was given: Court below gave this instruction: "If after a full consideration of all the testimony in the case in connection with your own inspection of the premises, you conclude that your own inspection of the premises is a more reliable basis for the estimate and compensation of damages, then you have a right under the law so to do, but you should not arbitrarily and without reason reject any of the testimony." Held that this was not law because it furnished a sufficient reason for disregarding the whole of the testimony.<sup>52</sup>

50—Spring Creek Dist. v. Elgin, Joliet & Eastern Ry. Co., et al., Appellants, 249 Ill. 260 (R. R.).

51—Prather v. Chicago South R. Co., 221 Ill. 190 (Af.).

52—Peoria Gas Light Co. v. Peoria Terminal Ry. Co., 146 Ill. 372 (R.).

Mitchell et al. v. Ill. & St. Louis R. & Coal Co., 85 Ill. 566 (Af.); Chicago & Iowa R. Co. v. Hopkins et al., Exrs., 90 Ill. 316 (Af.); Green v. Chicago, City of, 97 Ill. 370 (Af.); McReynolds et al. v. B. & O. Ry. Co., 106 Ill. 152 (Af.); Chicago & Evanston R. R. Co. v. Blake, 116 Ill. 163 (Af.); Ward v. M. & N. B. Co., 119 Ill. 287 (Af.)

See 127 Ill. 144 (R. R.) and Ch. City of Appellee v. Witt et al., 289 Ill. 520 (R. R.) where verdicts were set aside.

Kiernan v. Chicago, Santa Fe & Cal. R. Co., 123 Ill. 188 (Af.); Calumet River Ry. Co. v. Moore et al., 124 Ill. 329 (Af.); Stockton v.

Chicago, City of, 136 Ill. 434 (Af.); O'Hare v. C. M. & N. R. R. Co., 139 Ill. 151 (Af.); Maywood Co. et al. v. Maywood, Village of, 140 Ill. 216 (Af.); Hercules Iron Works v. E. J. & E. Ry. Co., 141 Ill. 491 (Af.); Chicago, Paducah & Memphis R. Co. v. Mitchell, 159 Ill. 406 (Af.); Metropolitan West Side R. Co. v. Johnson, 159 Ill. 434 (Af.); Pittsburg, Ft. Wayne & C. R. Co. v. Lyons et al., 159 Ill. 576 (Af.); Braun v. Met. West Side El. R. R. Co., 166 Ill. 434 (Af.); Lyon et al. v. Hammond & Blue Island Ry. Co., 167 Ill. 527 (Af.); Davis et al. v. Northwestern El. R. R. Co., 170 Ill. 595 (Af.); West Chicago St. R. R. Co. v. Chicago, City of, 172 Ill. 198 (Af.); Rock Island & Peoria Ry. Co. v. The Leisy Brewing Co., 174 Ill. 547 (Af.); Chicago General Ry. Co. v. Murray et al., 174 Ill. 259 (Af.); Chicago Terminal Transfer R. Co. v. Bugbee, Admx., et al., 184 Ill. 353 (Af.); Conness v. I. I. &

STATUTORY REVIEW OF VERDICTS IN *EX DELICTO* CASES—  
VERDICTS SET ASIDE

In *ex delicto* cases where it is apparent that the verdict is the result of passion or prejudice, it will be set aside.

This case refers to Statute of 1837. The defendant was charged with erecting a mill dam and consequently overflowing and setting back the water of the stream, thereby injuring the plaintiff and preventing him from enjoying his natural rights.<sup>53</sup>

A is put off a passenger train eighty rods from the depot from whence the train started, for refusing to pay five cents more for fare than would have been charged had he bought a ticket at the depot. It was raining and the passenger had to walk through the rain—no evidence that he took cold. Action on the case; verdict \$1,000. Court: "We cannot hesitate to say that the damages allowed are grossly, not to say outrageously excessive. \* \* \* Where it is apparent, at first blush, that the jury have misapprehended the law of the case, or misunderstood the facts, or else have been influenced by their passion or their prejudices rather than the law and the facts, the court will not allow the verdict to

I. Railroad Co., 193 Ill. 464 (Af.); Lanquist v. Chicago, City of, 200 Ill. 69 (Af.); Sexton v. Union Stock Yard Co., 200 Ill. 244 (Af.); Spohr v. Chicago, City of, 206 Ill. 441 (Af.); Brown v. Ill., Iowa & Minn. R. Co., 209 Ill. 402 (Af.); St. Louis & O'Fallon Ry. Co. v. Union Trust & Savings Bank, 209 Ill. 457 (Af.); Chicago & Milwaukee El. R. Co. v. Diver et al., 213 Ill. 26 (Af.); Martin v. C. & M. R. R. Co., 220 Ill. 97 (Af.); Prather v. Chicago South R. R. Co., 221 Ill. 190 (Af.); Pullman Co. v. Chicago, City of, 224 Ill.

248 (Af.); Stockton v. Chicago, City of, 136 Ill. 434 (Af.); Hercules Iron Works v. Elgin, Joliet & Eastern Ry. Co., 141 Ill. 491 (Af.); St. L., Etc. v. Belleville, City of, Ry. Co., 158 Ill. 390 (Af.); Brown v. Ill., Iowa & Minn. Ry. Co., 209 Ill. 402 (Af.); Dowie v. Chicago, Waukegan & North Shore Ry. Co., 214 Ill. 49 (Af.).

53—Hill, plaintiff below, plaintiff in error v. Ward, 2 Gil. 285 (R. R.) (This case is cited in Chicago City Ry. Co. v. Mead, 206 Ill. 174 (Af.)).



stand." Reversed only because the damages were excessive.<sup>54</sup>

Verdict \$4,950. Evidence insufficient to sustain verdict for that amount. Plaintiff charged the company as common carrier.<sup>55</sup>

Court: "In this case there was some apparent conflict of the evidence as to the care of the appellant at the time, some of the witnesses swear that they did not hear the signal of the bell or whistle, or see the headlight of the engine, but a number of the witnesses testify positively to the fact that the bell was rung for the usual distance, and that the headlight was burning. \* \* \* The weight of evidence on this point would seem to be clearly in favor of the appellant. Appellee's witnesses only testify negatively, that they did not see the light or hear the bell, while appellant's witnesses state positively that the bell was rung and the light was burning. \* \* \* The rule is familiar that positive evidence of this character is entitled to more weight than negative."<sup>56</sup>

#### SPECIAL REFERENCE TO STATUTE OF 1837

Action on the case. Long opinion by Judge Breese. The point was made that the court had no right to reverse the verdict of the jury. That it was an invasion of the rights of the jury to decide facts. To this contention the court replied: "This court is clothed with power by express statute, to consider a case on the evidence, else why is the evidence certified up to this court. This court will look into the error which questions the finding of a jury, whether upon the law or the evidence,

54—Chicago, Burlington & Quincy  
R. Co. v. Parks, 18 Ill. 460 (R. R.).

56—Chicago & Rock Island R. R.  
Co. v. Still, 19 Ill. 499 (R. R.).

55—Galena & Chicago Union R.  
R. Co. v. Rae et al., 18 Ill. 488 (R.  
R.).

## FORM NO. 96

## ENGINEER'S REPORT OF FINAL COMPLETION TO BOARD

....., Ill., ..... , 19....

To the Board of Local Improvements of the City of.....,  
Illinois:

Gentlemen:—I beg to certify that the work of the local improvement of.....Street, in the City of....., Illinois, from the.....line of.....Street, to the.....line of.....Street, has been finally completed, and that the cost of the same is as follows:

.....Sq. yds. of paving at \$..... per sq. yd. ....	\$.....
.....Lin. ft. curbing at \$..... per ft. ....	\$.....
Total due contractor .....	\$.....

*Recapitulation.*

Estimated cost of improvement .....	\$.....
Amount paid contractor .....	\$.....
Amount due contractor .....	\$.....
Court costs and necessary expenses.....	\$.....

---

\$.....

Amount estimated to pay accruing interest on bonds and  
vouchers issued to anticipate collection of assess-  
ment .....

Amount to be rebated .....

.....

Respectfully submitted,

.....,

Engineer.

## FORM NO. 97

APPLICATION OF BOARD ON CERTIFICATE OF COMPLETION  
AND ACCEPTANCE

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improve-  
ment of .....

.....

nance No. ...., to....., on.....  
 proposal as follows.  
 .....  
 .....  
 Dated....., Illinois, ....., 19....  
 .....  
 President of the Board of Local Improvements of....., Ill.

# FORM NO. 92

## FIRST VOUCHER ON ACCOUNT OF WORK DONE

....., Ill.,....., 19....

*Voucher No.* ..... *Special Assessment No.* .....

*To the Treasurer of the City of*....., Ill.:

From the funds realized from the collection of the first installment of the special assessment levied by the City of....., Illinois, and confirmed by the.....Court of.....County, Illinois, for the improvement of.....  
 .....  
 in said city, as provided for in and by Ordinance No.....of said city, but out of no other tax or fund, pay to.....  
 the sum of.....Dollars (\$.....).

This voucher is given on account of work done in pursuance of contract entered into for the making of the above mentioned improvement and is the *first* voucher issued on account of such work done.

The holder hereof expressly agrees in all things to be governed by an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, and all acts amendatory thereof.

This voucher is payable at the office of the City Treasury of the City of....., Illinois, solely out of the collection of the first installment of said assessment.

City of ..... , Ill.,  
 By .....

Attest: .....

**NOTE:**—Other vouchers against the first installment may be drawn to conform to the form above given.

The first voucher "on account of work done" need not necessarily be drawn against the first installment. That installment may be exhausted by other vouchers having a preference upon it.

a case for punitive damages. The court says that the proof showed that the net value of the stock was \$411. The verdict is \$30 too much. No proof that the steer killed was the plaintiff's, nor is it claimed in the declaration.<sup>65</sup>

#### VERDICT EXCESSIVE

Case: Passenger claimed that the train jerked just as he was getting off, and that he was violently thrown to the ground. Verdict \$3,000. Verdict against the weight of evidence.<sup>66</sup>

Case: Injury to plaintiff at a street corner; verdict, \$7,500. Verdict not sustained. The great preponderance of testimony is against the verdict.<sup>67</sup>

Action for assault and battery; attempt to commit rape upon a married woman. Verdict \$4,000. Plaintiff remits \$1,500. This case was reversed because the damages were excessive. It does not appear whether all the evidence was in the record or not. It may be that it was a common law motion for a new trial.<sup>68</sup>

Case: Killing three horses. Court says: That the verdict is "manifestly against the instructions and the evidence."<sup>69</sup>

Court: "We have examined the record in vain to discover evidence upon which this verdict can be sustained."<sup>70</sup>

The plaintiff at play with boys climbed in the street upon the stirrup of a freight car. It was claimed that the yardmaster by loosening the break caused the car to move and the boy's foot was injured by the car passing over it. Court says: Verdict wholly unsustainable by

65—Toledo, Peoria, etc., Ry. Co. v. Arnold, 43 Ill. 418 (R. R.).

66—Ohio & Mississippi R. R. Co. v. Schiebe, 44 Ill. 450 (R. R.).

67—Chicago & Alton R. R. Co. v. Gretzner, 46 Ill. 74 (R. R.).

68—Timmons v. Broyles et ux., 47 Ill. 92 (R. R.).

69—Central R. R. Co. v. Swearingen, 47 Ill. 206 (R. R.).

70—Chester v. Porter, 47 Ill. 66 (R. R.).

the evidence and instructions will have to be modified." <sup>71</sup>

Trespass; conductor used force to eject a passenger between stations because he refused to pay his fare. Verdict, \$1,000. Court: "Grossly excessive." <sup>72</sup>

A passenger was injured by a car being thrown from the track; no bones broken; verdict, \$5,000. Held, "excessive." <sup>73</sup>

Commenced before a justice; verdict, \$68. Held, "no evidence." <sup>74</sup>

Deceased was a track repairer of Pittsburg, Fort Wayne & Chicago. Two roads used common tracks. Verdict against evidence. <sup>75</sup>

Case: Brakeman of a freight train had left arm broken, so that it had to be amputated; head bruised. Verdict, \$10,000. Held, "excessive." <sup>76</sup>

Case for malicious prosecution; second verdict \$25,000; \$5,000 remitted. Held, "excessive." <sup>77</sup>

Case: Plaintiff's mules frightened at sound of the whistle of defendant's engine; overturned wagon. Verdict, \$1,525. Held, "excessive." <sup>78</sup>

Party injured at crossing. Verdict against the evidence. <sup>79</sup>

Case: Verdict, \$3,000. Held, "excessive." <sup>80</sup>

Verdict is not sustained by the evidence. <sup>81</sup>

71—Chicago & Alton R. R. Co. v. McLaughlin, 47 Ill. 265 (R. R.).

72—Chicago & Northwestern Ry. Co. v. Peacock, 48 Ill. 253 (R. R.).

73—Chicago & Rock Island R. R. Co. v. McAr, 52 Ill. 296 (R. R.).

74—Chicago & Rock Island R. R. Co. v. Fahey, 52 Ill. 81 (R. R.).

75—Chicago & Northwestern R. R. Co. v. Sweeney, Adm., 52 Ill. 325 (R. R.).

76—Illinois Central R. R. Co. v. Welch, 52 Ill. 183 (R. R.).

77—Walker v. Martin, 52 Ill. 347 (R. R.).

78—C. B. & Q. R. R. Co. v. Dunn, 52 Ill. 451 (R. R.).

79—Chicago & Alton R. R. Co. v. Fears, 53 Ill. 115 (R. R.).

80—Decatur, City of v. Fisher, 53 Ill. 407 (R. R.).

81—Toledo, Peoria & Warsaw R. R. Co. v. Pindar et al., 53 Ill. 447 (R. R.).

STATE OF ILLINOIS,  
County of ..... } ss.

....., being duly sworn, on oath, depose and say that we are each worth the sum of..... Dollars, over and above all incumbrances and statutory exemptions.

SUBSCRIBED and sworn to before me, this.....day of....., 19....

.....,  
Notary Public.

STATE OF ILLINOIS,  
County of ..... } ss.

....., being duly sworn, on oath deposes and says that he is worth the sum of..... Dollars, over and above all incumbrances and statutory exemptions.

SUBSCRIBED and sworn to before me, this.....day of....., 19....

.....,  
Notary Public.

## FORM NO. 90

### GENERAL ORDER OF BOARD DESIGNATING NEWSPAPER IN WHICH TO PUBLISH AWARDS

*Be it Resolved*, That all notices of awards of contracts by this Board, under and by virtue of an Act entitled "An Act Concerning Local Improvements," approved June 14th, 1897, in force July 1st, 1897, be advertised in the....., a ..... newspaper, published and circulated in this city.

*Be it further Resolved*, That this order be entered in full in the records of this Board.

## FORM NO. 91

### NOTICE OF AWARD

Notice is hereby given that the Board of Local Improvements of the City of....., Illinois, at a meeting held on the..... day of....., 19...., did award the contract for the construction of the improvement of (here describe), as contemplated by Ord-

installment, shall only share pro rata with the vouchers and bonds, and interest thereon, for the remaining part thereof.

In case the said "City" shall become the purchaser of any special assessment certificates at any sale for delinquent special assessments, in default of other bidders, such purchase shall not be deemed a collection of such special assessment, and no act of the "City," done or suffered, shall be construed as a collection of any special assessment, or part thereof, until the money due thereon shall be actually paid into the treasury.

The said "City" hereby covenants and agrees, in consideration of the covenants and agreements in this contract specified, to be kept and performed by the said "Contractor," subject to the conditions herein contained, to cause to be made, by the.....of said "City" on the.....day of each and every month during the progress of the work herein provided, estimates of the amount and value of the work then actually constructed and in its permanent place; and vouchers against the special assessment levied to pay for this improvement, to the amount of 85 per cent. of the estimated value of said work, actually constructed and in its permanent place for the then expiring month, will be issued and delivered to said contractor; said vouchers being redeemable in ....., at the office of the.....in said city, the remaining 15 per cent. of the amounts of said estimates and due under this contract, to be retained as a guarantee against poor workmanship and material, until the work contemplated by this contract has been fully completed and accepted by the Board of Local Improvements, and such acceptance and completion, certified and confirmed by the Court in which the assessment for the said improvement was confirmed, as required by law, and when such completion is so confirmed by said Court, said remaining 15 per cent. is to be paid or delivered to said "Contractor" in....., it being agreed that said "Contractor" is to be paid for said improvement in.....

The "City" reserves the right at all times to refuse to issue a voucher against the assessment for this improvement in case the said "Contractor" has neglected or failed to pay any sub-contractor, workman or employee on the work.

No part of the work herein provided for shall be sublet or sub-contracted, without the express consent of the said Board of Local Improvements, to be entered in its records, and in no case shall such consent relieve said "Contractor" from the obligation herein entered into, or change the terms of this agreement.

It is further covenanted and agreed by and between the parties hereto  
.....  
.....

This contract shall extend to and be binding upon the successors and assigns, and upon the heirs, administrators, executors and legal representatives of the "Contractor."

IN WITNESS WHEREOF, The said "Contractor" has hereunto set  
.....hand.....and seal....., and the said "City" has caused this agreement to be signed by the President of the Board of Local

REFUSAL OF COURT TO SET ASIDE VERDICT ON REVIEW—RULE  
FOR WEIGHING EVIDENCE IN PASSING UPON THE  
VERDICT OF A JURY

In an action of trespass *de bonis asportatis* the jury found for the defendant. In the supreme court it was assigned as error that the verdict was against the evidence.

Court observes: "Where there is a contrariety of evidence on both sides, and the facts and circumstances, by fair and reasonable intendment, will warrant the inferences of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of their credibility, to attach such weight to the testimony of each, as may seem to be proper, after due consideration of all the circumstances, arising in the particular cases; such as the relationship of the witnesses to one or both of the parties in controversy, his supposed interest in the event of the suit, his means of knowledge, etc., his appearance upon the stand, manner of testifying, general character for veracity, and the like, and to find their verdict accordingly."<sup>6</sup>

Case: Verdict, \$150 for plaintiff. Exception to the ruling of the court on the motion for a new trial on the ground that the verdict was not sustained by the evidence. Court: "When a question is fairly and intelligently submitted to a jury, their determination ought not to be set aside without the most substantial reasons. If a verdict is to be overthrown because it does not

Wellhoener, 72 Ill. 60 (R.); Ehrich  
v. White, 74 Ill. 481 (R. R.); Scott  
v. Bryson, 74 Ill. 420 (R. R.); Chi-  
cago, City of v. Lavelle, 83 Ill. 482

(R. R.); Chicago, City of v. Bixby,  
84 Ill. 82 (R. R.).

6—Lowry v. Orr et al., 1 Gil. 70  
(Af.).



entirely correspond with the judgment of the court, we better abolish trial by jury altogether, or at least require the judge to tell the jury precisely and distinctly what his opinion of the case is, and require them to find accordingly, and thus save the expense of a second trial." "Although we should have been entirely satisfied and perhaps better satisfied with the verdict, had they found the other way, yet we cannot say that the verdict is so palpably against the evidence as to induce the belief that the jury misunderstood the evidence or acted from prejudice or partiality, which should be the case before the court would be authorized to set aside the verdict." (Quoted from page 621.)<sup>7</sup>

Trespass on the case for criminal conversation. Verdict, \$225. Motion for a new trial overruled and exception. It does not affirmatively appear whether all the evidence is in the record. The court observes: "We deem it unnecessary to review the evidence. Taken altogether, it is of a character to warrant the inference which the jury has drawn. In such a case the court will never disturb the verdict of a jury."<sup>8</sup>

Court: "The testimony was conflicting and contrary to such a degree, that a finding either way would not have demanded any interference on the part of the court." Action on the case for disturbing a water course.<sup>9</sup>

Trespass for shooting a horse. When "evidence is circumstantial, the court will rarely, if ever, disturb the verdict, whenever there is any in the record tending to support the finding of the jury."<sup>10</sup>

Evidence conflicting, and it is in the province of the jury to determine its weight.<sup>11</sup>

7—Kincaid v. Turner, 2 Gil. 618 (Af.).

8—Boney v. Monaghan, 3 Gil. 85 (Af.).

9—Mann et al. v. Russell, 11 Ill. 586 (Af.).

10—Young v. Silkwood, 11 Ill. 36 (Af.).

11—Blake v. Dow, 18 Ill. 261 (Af.).

newspaper of general circulation, regularly published in the said City of ....., for at least six months prior to the first publication of said notice; that the first publication of the notice aforesaid was had at least fifteen days prior to the time fixed by the Court for the hearing herein and hereon; that said notices, by posting and publication, in all respects complied with the statutes of this state in such cases made and provided, and were in all respects legal and sufficient, and posted and published in manner and form prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming any interest in any of the premises mentioned and described in the assessment roll heretofore confirmed in this cause and of the property therein described and assessed, and of this cause and the subject matter thereof.

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT, That judgment be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the said assessment roll and report for the said improvement as heretofore confirmed in this Court, and all persons having or claiming an interest in any of said premises.

The Court further finds and adjudges that all the matters and facts stated in said certificate filed in this cause by the said Board of Local Improvements are true; that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; that the total amount assessed for the said improvement upon the public and private property is the sum of \$.....; and that the cost of the said improvement, including the amount estimated by said Board to be required to pay interest on bonds and vouchers issued to anticipate collection of said assessment, is the sum of \$.....; and that the sum of \$..... shall be abated.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, That the said certificate of the said Board of Local Improvements be and the same is hereby, in all respects, approved and confirmed, and that the said assessment, as heretofore made upon the public and private property, as the same was heretofore confirmed by the judgment of this Court, and upon each and every lot, block, tract and parcel of land and property assessed, shall be abated and reduced proportionately to the public and to the private property owners, and shall be credited pro rata upon the respective assessments for said improvement in the amounts set forth in the hereto attached schedule, and that the said assessment be and the same is hereby confirmed as so reduced against the public, and each installment thereof, and against each lot, block, tract or parcel of land and property assessed, and each installment thereof.

IT IS FURTHER ORDERED BY THE COURT, That this judgment be certified by the Clerk of this Court to the.....of said City of.....

Approved: .....,  
Judge.

NOTE:—Attach schedule of rebated assessment roll.

same; that the total amount assessed for the said improvement upon the public and private property does not exceed the cost of the said improvement and the amount estimated to be required to pay interest on bonds and vouchers issued to anticipate collection of said assessment, and that the said assessment as heretofore confirmed shall not be abated or reduced.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, That the said certificate of the said Board of Local Improvements be and the same is hereby, in all respects, approved and confirmed, and that the said assessment, as heretofore made upon the public and the private property owners, shall stand as heretofore confirmed by this Court.

Approved: \_\_\_\_\_,  
Judge.

## FORM NO. 102

### ORDER OF COURT CONFIRMING APPLICATION AND CERTIFICATE—OBJECTIONS—NO REBATE

STATE OF ILLINOIS, }  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improvement of .....  
.....

#### Application and Certificate of the Board of Local Improvements on Completion of the Work

Now on this.....day of....., 191., this being one of the regular judicial days of the.....Term, 191., of said Court, comes the Petitioner herein, by....., its attorney, and makes proof of giving of the notice by law required, by posting and publishing, and moves the Court for default herein against all persons and property on account of which objections have not been heretofore filed.

And the Court being fully advised in the premises, it is ordered and adjudged by the Court that default be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the assessment roll and report for the improvement herein, heretofore confirmed in this Court and all persons having or claiming an interest in any of said premises on account of which objections have not been heretofore filed.

mony as embodied in a bill of exceptions." On the question of damages the court observes: "How this pecuniary damage is to be measured, \* \* \* in other words, what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury. The legislature seems to have used language which seems to recognize this difficulty of exact measurement, and commits the question especially to the finding of a jury. The law provides that 'they are to give such damages as they deem a just and fair compensation.' What the life of one person is worth, in a pecuniary sense, to another, is a question incapable, from its nature, of exact determination. Although the wealth or poverty of the deceased may be important elements, they are not the only ones that enter into the problem. If the deceased was poor, the loss may consist in the fact that his personal exertions can no longer support those dependent upon him. If rich, the loss may be nearly as great, in the deprivation of the care and management of his estate or business. In creating the right, the legislature have confided to the jury a subject, that does not lie within the limits of exact proof. But in this, as in all other actions, the court must so far supervise the verdict as to see that it is not the result of unreasoning prejudice or passion." Quoted from page 347.<sup>22</sup>

Case: Killing a cow; no external marks of violence upon the cow. Court (Lawrence, Judge): "The question is purely one of fact, the determination of which belonged to the jury, and though doubtful of the correctness of their finding, our convictions are not sufficiently clear to justify us in setting aside the verdict."<sup>23</sup>

Case: Slander, verdict, \$800.<sup>24</sup>

22—Chicago & Alton R. R. Co. v. Shannon, Adm., 43 Ill. 338 (Af.).

24—Baker v. Young, 44 Ill. 42 (Af.).

23—Chicago & Northwestern Ry. Co. v. Dement, 44 Ill. 74 (Af.).

Case: Plaintiff injured by the running away of his team, caused by an engineer of the railroad letting off steam from his engine with a loud noise, just as plaintiff was crossing the track. Two counts, each charging that it was done wantonly and wilfully. Demurrer to declaration overruled. Court: "The evidence in this record is conflicting, and was properly left to the consideration of the jury. In such a case this court will not disturb the verdict, unless we can see that it is manifestly against its weight." <sup>25</sup>

Case: Damages, \$1,311, not so excessive as to manifest prejudice or passion. <sup>26</sup>

Action before a justice for the value of a colt; three verdicts for defendant; court hesitated to disturb verdict unless palpably against the evidence. <sup>27</sup>

Verdict, \$828; not clearly against the evidence. <sup>28</sup>

Case: Verdict for the defendant; evidence conflicting. <sup>29</sup>

Case: Fireman on a locomotive killed. <sup>30</sup>

Court: "We have most carefully considered the entire evidence contained in the record, and we cannot say that there is a total failure of evidence to support the verdict, or that it is so manifestly against the weight of evidence that an appellate court would, for that reason alone, award a new trial." <sup>31</sup>

25—Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298 (Af.).

Illinois & Wisconsin R. R. Co. v. Von Horn, 18 Ill. 257 (Af.); Bloom v. Crane et al., 24 Ill. 48 (Af.); Wallace v. Wren, 32 Ill. 146 (Af.); Chicago & Rock Island R. R. Co. v. Hutchins, 34 Ill. 108 (Af.); Hiner v. People, 34 Ill. 297 (Af.); O'Reily v. Fitzgerald, 40 Ill. 310 (Af.); Toledo, Peoria & Warsaw Co. v. McClannan, 41 Ill. 238 (Af.); Chicago & N. W. R. R. Co. v. Williams, 44 Ill. 176 (Af.); Chicago,

City of v. Martin et ux, 49 Ill. 241 (R. R.).

26—Chicago, City of v. Smith, 48 Ill. 107 (Af.).

27—Chittenden v. Evans, 48 Ill. 52 (Af.).

28—Bunker, Jr. v. Green, 48 Ill. 243 (Af.).

29—Sheeran v. Chicago & Milwaukee Ry. Co., 48 Ill. 523 (Af.).

30—C. B. & Q. R. R. Co. v. Gregory, 58 Ill. 272 (Af.).

31—Chicago, City of v. Martin et ux, 49 Ill. 241 (R. R.).

Application and Certificate of the Board of Local Improvements on  
Completion of the Work

Now on this.....day of....., A. D. 19...., this being one of the regular judicial days of the..... Term, A. D. 19...., of said Court, comes the Petitioner herein, the Board of Local Improvements of the City of....., Illinois, by....., its attorney, and moves the Court for default herein, and for the judgment of this Court, finding that all the matters and facts stated and alleged in the certificate filed herein, by said Board, are true, and that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the same; and this cause coming on to be heard upon the evidence introduced by the Petitioner herein, and no objections to said application and certificate or proceedings herein having been filed, and no defense thereto being made, and the Court being fully advised in the premises, it is adjudged by the Court that the application and certificate filed by the Petitioner herein are in all respects legal and sufficient; that notices of this hearing, as prescribed by law, were posted in at least four public places in the neighborhood of said improvement in said City of....., at least fifteen days prior to the time fixed for the hearing herein and hereon, and a like notice was published ("at least five successive days" or "once in each week for two successive weeks" as the case may be), in the..... (a "daily" or "weekly" as the case may be), secular newspaper of general circulation regularly published in the said City of....., for at least six months prior to the first publication of said notice; that the first publication of the notice aforesaid was had at least fifteen days prior to the time fixed by the Court for the hearing herein and hereon; that said notices, by posting and publishing, in all respects complied with the statutes of this state in such cases made and provided, and were in all respects legal and sufficient, and posted and published in manner and form prescribed by law.

It is further found and adjudged by the Court that it has obtained full and complete jurisdiction of all the persons having or claiming any interest in any of the premises mentioned and described in the assessment roll heretofore confirmed in this cause and of the property therein described and assessed, and of this cause and the subject-matter thereof.

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT, That default be and the same is hereby entered against each and all of the lots, blocks, tracts and parcels of land and property assessed and described in the said assessment roll and report for the said improvement as heretofore confirmed in this Court, and all persons having or claiming an interest in any of said premises.

The Court further finds and adjudges that all the matters and facts stated in said certificate filed in this cause by the said Board of Local Improvements are true; that the said improvement conforms substantially to the requirements of the original ordinance for the construction of the

Application and Certificate of Board of Local Improvements on Completion of Work.

*To the Honorable Judge Presiding:*

Now comes the Board of Local Improvements of the City of....., Illinois, and presents herewith its certificate of the final completion and acceptance of the work provided for in the above mentioned proceedings, and causes the cost thereof, together with the amount estimated by the said Board to be required to pay accruing interest on bonds and vouchers issued to anticipate collection of the assessment herein, to be certified to this Court.

Wherefore, this Petitioner makes application to said Court to consider and determine whether or not the facts and matters stated in the hereto attached certificate are true, and to set a time and place to consider and determine such facts and matters.

.....,  
.....,  
.....,

Board of Local Improvements of the City of....., Ill.

FORM NO. 98

CERTIFICATE OF COMPLETION AND ACCEPTANCE—WHEN ASSESSMENT DOES NOT EXCEED COST

STATE OF ILLINOIS,  
County of ..... } ss.

In the.....Court,  
To the .....Term, A. D. 19....

In the Matter of the Petition of the City of....., Illinois,  
to Levy a Special Assessment to Pay the Cost of the Local Improvement of .....  
.....

Application and Certificate of Board of Local Improvements on Completion of Work.

*To the Honorable Judge Presiding:*

The Board of Local Improvements of the City of....., Illinois, does hereby certify that the work on the improvement made in pursuance of the ordinance herein, has been finally completed and accepted by said Board of Local Improvements; that the cost of said improvement is the sum of \$.....; that the amount estimated by said Board to be required to pay accruing interest on bonds and vouchers issued to anticipate collection of the assessment herein, is the sum of \$.....; that the total amount assessed for said improvement upon the public and private property is the sum of \$....., and that

Case: Verdict, \$5,000. Reversed upon another point; finding of fact not disturbed.<sup>46</sup>

Case: Seducing plaintiff's wife. Reversed on another point. Verdict, \$1,500, not excessive. Court: "The amount of damages in such cases is very much a matter of feeling to be controlled by no rigid rule."<sup>47</sup>

Case: Verdict, \$750. Point made that the damages are excessive. Court: "Always manifests a reluctance to disturb verdicts on account of excessive damages in cases of this nature, and never disturb them unless it is palpable, from the amount of damages assessed, that the jury have acted under influence or prejudice or passion."<sup>48</sup>

Case: Death of a child four years old. Verdict, \$800. Held, not excessive. Law implies pecuniary loss.<sup>49</sup>

Case: Killing a mare. Verdict, \$150. No direct evidence; circumstances lead the mind to the conclusion.<sup>50</sup>

Trover for a diamond ring. Verdict and judgment for plaintiff. Some conflict in testimony.<sup>51</sup>

Case: Verdict, \$3,000. Court says: Better satisfied if verdict less.<sup>52</sup>

#### REFERENCE TO STATUTE OF 1837

Mandamus. "At common law the jury are judges of the facts submitted; \* \* \* but our statute provides, where error is assigned—this court shall review the finding." \* \* \* We can, therefore, only set aside the finding when it appears to be clearly unsupported by the evidence."<sup>53</sup>

46—T. W. & W. Ry. Co. v. Moore, Adm., 77 Ill. 217 (R. R.).

47—Cruise v. Rutledge, 81 Ill. 266 (R. R.).

48—Nelson v. Danielson, 82 Ill. 545 (Af.).

49—Chicago, City of v. Helsing, Adm., 83 Ill. 204 (Af.).

50—McLain v. Farden, 83 Ill. 15 (Af.).

51—Hayes v. Houston, 86 Ill. 487 (Af.).

52—Elgin, City of v. Renwick, 86 Ill. 498 (Af.).

53—People ex rel. v. Waynesville, Town of, 88 Ill. 469 (Af.).



Damages under the Eminent Domain Act. Claimed that the verdict is contrary to the evidence. Court: "Considerable conflict of opinion among witnesses as to damages. Jury to determine weight. Jury saw premises. Statute contemplates taking that into account."<sup>54</sup>

Court: "Damages are not excessive. The evidence seems to be irreconcilably conflicting; and where it is so inharmonious, we never undertake to say what shall be received and acted upon, which part rejected."<sup>55</sup>

SPECIAL ASSESSMENT—CONFIRMATION JUDGMENTS

Refusal of the court to set aside verdicts supporting confirmation judgments.

Waters et al. v. Town of Lake, 129 Ill. 23 (Af.).

Watson v. Chicago, City of, 115 Ill. 78 (Af.).

Chicago Rock Island and Pacific Railway Co. v. Chicago, City of, 139 Ill. 573 (Af.).

Maywood Co. et al. v. Maywood, Village of, 140 Ill. 216 (Af.).

Kelly et al. v. Chicago, City of, 148 Ill. 90 (Af.). (Evidence not in the record on which verdict was based.)

Vane et al. v. Evanston, City of, 150 Ill. 616 (Af.). (Jury viewed the premises.)

Pike et al. v. Chicago, City of, 155 Ill. 656 (Af.).

Goodwillie et al. v. Lakeview, City of, 137 Ill. 51 (Af.).

Finding of fact by the court. Bill of exceptions did not contain all the evidence.

Topliff et al. v. Chicago, City of, 196 Ill. 215 (Af.).

54—Chicago & Iowa R. R. Co. v. Hopkins et al., 89 Ill. 316 (Af.).

55—Race et al. v. Oldridge, 90 Ill. 250 (Af.).

Ryan et al. v. Donnelly, 71 Ill. 100 (Af.); Emory v. Addis, 71 Ill. 274 (Af.); Jones v. Jones, 71 Ill. 562 (Af.); Rockford, Rock Island

& St. L. R. R. Co. v. Hillmer, 72 Ill. 235 (Af.); Pekin, City of v. Winkle, 77 Ill. 56 (Af.); Kath v. Eppy, 80 Ill. 283 (Af.); Hirsch v. Feeney, 83 Ill. 548 (Af.); Chicago & Alton R. R. Co. v. Becker, 84 Ill. 483 (Af.); Ragain v. Stout, 182 Ill. 645 (Af.).

Chicago Union Traction Co. et al. v. Chicago, City of, 202 Ill. 576 (Af.).

Hulbert v. Chicago, City of, 213 Ill. 452 (Af.).

REVIEW OF VERDICTS BY COURTS—RIGHT OF EXCEPTION AND  
ASSIGNMENT OF ERROR UPON FINDINGS OF FACT BY  
TRIAL COURT AND VERDICTS OF JURIES IN  
CRIMINAL CASES

That exceptions to the decisions of the circuit court overruling motions for new trials shall hereafter be allowed in criminal cases, and in appeal and qui tam actions, as well as in civil cases; and the party excepting to such decision may assign the same for error.

An act to amend section 23, chapter 86, revised statutes, approved February 16, 1857; in force July 1st, 1857.

See Session Laws, page 28, 1857; also page 103, same volume.

Revised Statutes of 1874, chapter 110, section 63, page 782.

Session Laws of 1907, section 84, page 460.

July 1, 1877, the act creating appellate courts, went into force. See Session Laws of 1877, page 69.

Contemporaneous with that act, an amendment was added to the Practice Act whereby the supreme court was restricted to its original common law function, as a court of review in all cases, except criminal cases, cases where a franchise, a freehold, or the validity of a statute was involved. Subsequently there was added the construction of the constitution.

VERDICTS IN CRIMINAL CASES SET ASIDE

If the evidence is clearly the result of passion or prejudice, or against the great preponderance of the evidence, it will be set aside on review.

Court: "The law has imposed upon the court the solemn and responsible duty to see to it that no injustice is done by hasty action, passion or prejudice, or from any other cause, on the part of the jury. This duty the court may not omit in any case."<sup>56</sup>

In holding the Statute of June 26, 1885, with reference to granting continuances in criminal cases constitutional, the court observes: "The constitution makes no provision for the continuance of causes for trial, and at common law, and until the passage of our statute allowing exceptions to be taken to decisions of courts in overruling motions for continuances in criminal cases, approved February 18, 1857, Public Laws of 1857, page 103, applications for continuances in criminal cases were addressed purely to the discretion of the court, and its decision thereon could not be assigned on error." This case was reversed on the refusal of the lower court to give an instruction tendered by the plaintiff in error.<sup>57</sup>

STATUTORY REVIEW OF VERDICTS IN CRIMINAL CASES—  
REFUSAL TO SET ASIDE VERDICTS

ACT FEBRUARY 18, 1857, P. 103

Court, in reply to request to set aside verdict, says: "It is true, the statute (quoting from page 41) has clothed this court with a revisory power over the verdicts of juries in criminal as it has in civil cases; and it is also true, that there is some difference between the

56—Mooney v. The People, 111 Ill. 388 (R. R.).

57—Hoyt v. The People, 140 Ill. 588 (R. R.).

Jones v. The People, 53 Ill. 366 (R. R.); Randall v. The People, 63 Ill. 202 (R. R.); Sargent v. The People, 64 Ill. 327 (R. R.); Mooney v. Peake, 111 Ill. 388 (R. R.); McMahon v. The People, 120 Ill. 581

(R. R.); Raggio v. The People, 135 Ill. 533 (R. R.); Morgan v. The People, 136 Ill. 161 (R. R.); Campbell v. The People, 159 Ill. 9 (R. R.); Waters v. The People, 172 Ill. 367 (R. R.); Kellar v. The People, 204 Ill. 604 (R. R.); Cunningham v. The People, 210 Ill. 410 (R. R.); Dahlberg v. The People, 225 Ill. 485 (R. R.).

two classes of cases, for, in criminal cases, the guilt of the accused must be established beyond a reasonable doubt, while, in civil cases, the issue is determined by a preponderance of evidence. In the latter case it is an established rule, if the verdict is wholly unsupported as to any necessary element, or if there is evidence upon both sides, and the verdict appears to be manifestly against the clear weight and preponderance of the evidence, we set it aside. In criminal cases, this court has as yet, established no fixed, definite rule, and it is doubtful whether any can be established further than this: If, when the evidence is all carefully considered and weighed, it appears that it is wholly wanting as to some necessary element of the crime, or if there is a conflict of evidence, and there is such a clear preponderance of evidence against the verdict, as to suspend the judicial mind in serious doubt as to the guilt of the accused, then, in either case, we ought to grant a new trial." 58

#### REVIEW OF VERDICTS—WILLS AND DIVORCES

When a statute directs that a question of fact shall be submitted to a jury, the verdict returned has the same force and effect as a common law verdict. This innovation in practice is applied most frequently in will con-

58—*Rafferty v. The People*, 72 Ill. 37 (Af.).

*Connelly v. The People*, 81 Ill. 379 (Af.); *Hanrahan v. The People*, 91 Ill. 142 (Af.); *Gainey v. The People*, 97 Ill. 271 (Af.); *Rogers v. The People*, 98 Ill. 581 (Af.); *Sholtz v. The People*, 121 Ill. 560 (Af.); *Steffy v. The People*, 130 Ill. 98 (Af.); *Cronk v. The People*, 131 Ill. 56 (Af.); *Scott v. The People*, 141 Ill. 195 (Af.); *Crane et al. v. The People*, 168 Ill. 395 (Af.);

*McCoy v. The People*, 175 Ill. 224 (Af.); *Gilman v. The People*, 178 Ill. 19 (Af.); *Crowell v. The People*, 190 Ill. 508 (Af.); *Henry v. The People*, 198 Ill. 162 (Af.); *McCracken v. The People*, 209 Ill. 215 (Af.); *Quigg v. The People*, 211 Ill. 17 (Af.); *Parsons v. The People*, 218 Ill. 368 (Af.); *Carrett et al. v. The People*, 220 Ill. 304 (Af.); *People v. Hagar, Plaintiff in Error*, 249 Ill. 603 (Af.).

tests under the statute, and divorce proceedings. If personalty alone is involved, the record goes direct to the appellate court, and a review of the verdict is had under the statute. Only law questions are passed upon by the supreme court on appeal from, or error to the former. If the title to real estate is involved, the record goes direct to the supreme court.<sup>59</sup>

59—Dowie et al. v. Sutton et al., 227 Ill. 183 (Af.).

Will cases: Thatcher v. Thatcher, 17 Ill. 66 (R. R.); Brownfield et al. v. Brownfield, 43 Ill. 147 (Af.); Meeker et al. v. Meeker, 75 Ill. 260 (Af.); Rutherford et ux. v. Morris et al., 77 Ill. 397 (R. R. Verdict set aside); Calvert v. Carpenter, 96 Ill. 63 (R. R.); Buchanan et al. v. McLennan et al., 105 Ill. 56 (R. R.); Long et al. v. Long et al., 107 Ill. 210 (Af.); American Bible Society et al. v. Price, 115 Ill. 623 (Af.); Schevalier et al. v. Seager et al., 121 Ill. 564 (Af.); Moyer et al. v. Swygart, 125 Ill. 262 (Af.); Sinnett et al. v. Bowman et al., 151 Ill. 146 (R. R.); Nicewander et al. v. Nicewander et al., 151 Ill. 156 (Af.); Bevelot v. Lestrode, 153 Ill. 625 (Af.); Harper et al. v. Parr et al., 168 Ill. 459 (Af.); Tucker v. Cole et al., 169 Ill. 150 (Af.); Smith et al. v. Henline, 174 Ill. 184 (Af.); Petefish v. Becker, 176 Ill. 448 (Af.); Egbers et al. v. Egbers et

al., 177 Ill. 82 (Af.); Hollenbeck v. Cook et al., 180 Ill. 65 (Af.) Keyes v. Kimmel et al., 186 Ill. 109 (Af.); Johnson et al. v. Johnson et al., 187 Ill. 86 (Af.); Bradley, Exr. v. Palmer, 193 Ill. 15 (R. R. Verdict set aside); Spencer et al. v. Spruell, 196 Ill. 119 (Af.); Piper et al. v. Andricks et al., 209 Ill. 564 (Af.); French et al. v. French, 215 Ill. 470 (Af.); Johnson v. Farrell, 215 Ill. 542 (Af.); Compher v. Browning, 219 Ill. 429 (Af.); Snell v. Weldon, Exr., Appellant, 239 Ill. 279 (R. R.); Drum v. Capps, Exr., et al. 240 Ill. 524 (R. R.); Catholic University of America v. Boyd et al., 227 Ill. 281 (Af.); Dougherty et al., Appellees v. State Savings Ac. et al., 292 Ill. 147 (R. R.).

Divorce cases: Becker v. Becker, 79 Ill. 532 (Modified Decree); Moore v. Moore, 88 Ill. 98 (Af.); Carter v. Carter, 152 Ill. 434 (Af.); Lenning v. Lenning, 176 Ill. 180 (Af.); Carter v. Carter et al., 283 Ill. 324 (R. R.)

## CHAPTER XXIV

### FARM DRAINAGE CASES ARRANGED FOR EXAMINATION

FARM DRAINAGE	{	ORGANIZATION OF DISTRICT.	{ Successful Direct Attack Unsuccessful Direct Attack
		ASSESSMENT OF BENEFITS. BY COMMISSIONER.	{ Successful Direct Attack Unsuccessful Direct Attack
	{	ASSESSMENT OF BENEFITS. BY COMMISSIONER.	{ Successful Collateral Attack Unsuccessful Collateral Attack
	{	ASSESSMENT OF BENEFITS. BY COMMISSIONER.	{ Successful Collateral Attack Unsuccessful Collateral Attack

#### ORGANIZATION

##### SUCCESSFUL DIRECT ATTACK

Boone's Pond Mut. Drain Dist., Appellants v. St. Louis, Iron Mountain & Southern Ry. Co., 268 Ill. 264 (Classification).

Schuh et al. v. Reed et al., Appellees, 259 Ill. 138 (Af.).

Molohon et al., Appellants v. Cashin et al., 258 Ill. 86 (Af.).

See Commissioners of Highways Town of Bement, Appellees v. Commissioners of Lake Fork Spec. Drain Dist., 246 Ill. 388, as to the powers and duties of the Commissioners under Sections 25 and 36 and Sec. 40 Farm Drainage Act, 1909, page 894.

##### CLASSIFICATION OF LANDS

Under the Farm Drainage Act the classification of the lands is the vital ceremony from which the land owner must take an appeal, if he desires to question the legality

of the assessment thereafter to be spread. There is no appeal from the assessment. A notice of the classification is given the land owner but none of the spreading of the assessment. The above is the holding of the Supreme Court in *Cosby et al., Appellants v. Barnes et al.*, 251 Ill. 460 (R. R.). *People v. Chapman*, 127 Ill. 387, *People v. Hulin et al., Appellants*, 237 Ill. 122 (Af.) and *People v. Schwank et al., Appellees*, 237 Ill. 40 (Af.) are cited in support of the rule.

#### UNSUCCESSFUL DIRECT ATTACK

*Drainage Commissioners of North Fork Special Drainage Dist., Def. in Error v. Rector Spec. Drain. Dist.*, 266 Ill. 536 (Af.).

Upper district held liable to contribute to a lower district, that contributes an outlet, for the cost of a common outlet.

#### SUCCESSFUL DIRECT ATTACK UPON ASSESSMENT

Under section 27 of the Farm Drainage Act approved June 27, 1885, it was held in *Mascall v. Commissioners, etc.*, 122 Ill. 620 (R. R.), that on appeal by a land owner from the amount of an assessment, there was a right to a trial by a common law jury. In 1901 section 27 was repealed but it was reenacted in 1915 (Ses. Laws, p. 389).

#### ASSESSMENT

#### SUCCESSFUL DIRECT ATTACK

*Commissioners of Sub-District No. 6, etc., Defendant in Error v. McNulta*, 242 Ill. 461 (Writ of Error dismissed).

Land in Champaign County, Piatt County, McLean County.

Certain portions of the land in said district are in sub-District No. 6. Plaintiff in error's land is in McLean county. Ten days after the classification of his land, he filed with the clerk of the county court of Champaign county, where the greater portion of the lands of the district lie, a bond which recited that he had appealed to the county court of McLean county.

October 3, 1908, the commissioners filed a motion in the county court of Champaign to dismiss the appeal. Nothing done with the motion.

February 12, 1909, commissioners made a motion to strike the appeal bond and its "purported approval" from the files. Motion allowed and a writ of error sued out to review the action of the county court.

Supreme Court held that this was not a final order. Court then passes upon a question never before raised, as the court says:

Question: In which court shall the bond be filed? In considering this question the court says:

Several kinds of farm drainage districts—

First District lies wholly within one town.

Second District lies in two towns in the same or different counties, called Union Districts.

Third. Land lying in three or more towns in the same or different counties. Called Special Drainage District.

The court refers to sections 49, 50, 51, 57, 58 and 60 of the Farm Drainage Act and says that section 60 requires the commissioners to make a classification of the lands of the district and file the same in the office of the clerk of the county court. "All orders made by the commissioners either of correction or confirmation shall be filed in the clerk's office within five days from the completion of the hearing and any person appearing and urging objections who is not satisfied with the decision of the commissioners in confirming the classification of his lands may appeal therefrom, within ten days after the order of the commissioners is filed in said court aforesaid



by filing with said clerk an appeal bond with good and sufficient security, to be approved by the clerk or judge thereof payable to said drainage district," etc. (See sec. 60, p. 99, Act of June 27, 1885).

The court says: "Section 61 provides the appeal shall be taken as provided by sections 24 and 25 which relate to the organization of districts that lie wholly in one township. The court concludes: "The bond in this case was filed by plaintiff in error in the court in which he was required by the statute to file it. It then became the duty of the clerk of the county court of Champaign county to make such a transcript of the proceedings as was necessary to present the questions involved by the appeal and transmit them to the county court of McLean county."

#### WITH REFERENCE TO WHAT THE CLERK SHOULD HAVE DONE

It was the duty of the clerk of the county court, upon the filing of a good and sufficient appeal bond, to make and transmit to the county court of McLean county such a transcript as was necessary to present the questions involved by the appeal. The law makes this his duty and he has no discretion in the matter. His failure or refusal to perform this duty was not justified or excused by the order of the court striking the appeal bond, for the court had no authority to make such order, and the clerk should have performed the duty enjoined upon him. His action in this regard is not subject to review by writ of error. The remedy is by mandamus to compel the clerk to do what is required of him by law."

#### SUCCESSFUL COLLATERAL ATTACK

People ex rel., Pl. in Err. v. Schwartz et al., 284 Ill. 159 (Af.).

People ex rel., Appellant v. Larsen, 282 Ill. 501 (Af.).

People ex rel., Appellant v. Graham et al., 280 Ill. 303 (Af.).

People ex rel., Pl. in Err. v. Fulton et al., 280 Ill. 415 (Af.).

People ex rel., Appellee v. Cleary et al., 276 Ill. 29 (R. R.).

People ex rel., Appellee v. Curry, 276 Ill. 324 (R. R.).

People ex rel., Appellant v. O'Daniel et al., 276 Ill. 338 (Af.).

People ex rel., Appellee v. Garner et al., 275 Ill. 228 (R. R.).

People ex rel., Appellant v. Bentley et al., 268 Ill. 470 (Af.).

People ex rel., Appellee v. Chi. & Interurban Trac. Co., 267 Ill. 510 (R.).

People ex rel., Appellee v. Jonkman et al., 266 Ill. 229 (R. R.).

People ex rel., Appellee v. Carr et al., 265 Ill. 220 (R. R.).

People ex rel., Appellee v. Scanlan et al., 265 Ill. 609 (R. R.).

People ex rel., Pl. in Err. v. White et al., 264 Ill. 168 (Af.).

People ex rel., Appellant v. Whitesell et al., 262 Ill. 387 (Af.).

People ex rel., Appellant v. Leonard et al., 261 Ill. 38 (Af.).

People ex rel., Appellee v. Burrall, 258 Ill. 509 (R. R.).

People ex rel., Appellee v. Wilder et al., 257 Ill. 304 (R. R.).

People ex rel., Appellee v. Brown, 253 Ill. 578 (R. R.).

People ex rel., Appellee v. Weatherhead, 253 Ill. 85 (R. R.).

People ex rel., Appellee v. Welch et al., 252 Ill. 167 (R. R.).

People ex rel., Appellant v. Green et al., 242 Ill. 455 (Af.).

People ex rel., Appellant v. Camp, 243 Ill. 154 (Af.).

See People ex rel., Appellee v. Adair et al., 247 Ill.

398 (R. R.), as to what a Farm Drainage record must show in order to support an additional or supplemental assessment. See also in connection with this case *People ex rel., Appellee v. Wylie*, 283 Ill. 515.

See *People ex rel., Appellee v. Wabash Ry. Co.*, 281 Ill. 311 (R. R.), with reference to certificates of levy and presumption with reference officers doing their duty. See *Lingle, Appellant v. Clear Creek Drain. and Levee Dist. et al.*, 281 Ill. 511 (R. R.), as to character of money deposited with the county clerk as compensation for property taken by drainage district.

#### CLASSIFICATION

##### NOT APPEAL FROM BUT ACQUIESCED IN BY ALL LAND OWNERS

Certain land owners acquiesced in the classification of their lands by the commissioners, but on appeal (all the land owners not joining) from a subsequent assessment of their lands, "where the cause was tried by a jury" there was a verdict greatly reducing the amounts. Subsequently the county clerk, on the certificate of the auditor, spread the interest upon certain drainage bonds of the district, "according to the acreage and ratio of benefits, as fixed by the established classification" of the lands. On application for judgment against the lands as delinquent, the county court reduced the tax thus extended to make it conform to the judgment that had been rendered upon the verdict fixing the maximum amount of benefit that the lands would receive from the improvement. The Supreme Court in sustaining the action of the lower court observes:

"That the judgments, on appeal, thus reducing the assessment, are conclusive as to the amount of benefits and that appellees, in no event, can be required to pay any thing beyond them, is too clear to admit of serious question. It is also equally clear that an assessment under the

Drainage Act in excess of the benefits, is simply void as to such excess. Notwithstanding all this, in making a subordinate assessment under the act, we find no provision in it expressly authorizing the substitution of the judgments for the corresponding amounts fixed by the original apportionment; yet the right, or rather duty, to make such substitution, must be inferred from the very necessity of the case, and to prevent a manifest failure of justice."<sup>1</sup>

An assessment must be apportioned or spread upon the land on the basis of the classification of the land. Omitting lands upon the assumption that they are not benefited will render the assessment void and subject to successful collateral attack.<sup>2</sup>

#### UNSUCCESSFUL COLLATERAL ATTACK

The leading case, on the proposition that the validity of the organization of a drainage district can not be determined on an application for judgment for a delinquent special assessment, is *Osborn v. People ex rel.*, 103 Ill. 224 (Af.).

On an appeal from the board of review, the presumption is in favor of the validity of the assessment. He who asserts that property is exempt has the burden of showing the facts upon which the conclusion rests. *Monticello Seminary, Appellant v. Board of Review Madison County, Appellee*, 242 Ill. 477. (Decision sustained).

*People ex rel., Appellant v. Graham et al.*, 280 Ill. 303 (R. R.).

*People ex rel., Appellant v. Dick et al.*, 276 Ill. 516 (Af.). Section 42 Farm Drainage Act referred to.

*People ex rel., Appellant v. Garner*, 267 Ill. 396 (R. R.), about sections 27, 62 and 70 of the act.

1—*People ex rel. v. Meyers et al.*,  
124 Ill. 95 (Af.).

2—*People ex rel. v. Cole et al.*,  
128 Ill. 158 (Af.).

Sanitary District Act of 1907. People ex rel., Appellee v. Bowman, 247 Ill. 276 (Af.).

Farm Drainage. People ex rel., Appellant v. York, 247 Ill. 591 (R. R.). Section 76 referred to.

Shannley et al. v. People, ex rel., 225 Ill. 579 (Af.).

The drainage commissioners under section 42 determined that certain land owners had connected their lands with the district. It can not be shown, to defeat the action of the collector, that the lands have not been connected.

People ex rel. v. Dyer, 205 Ill. 575 (R. R.). Assessment made under section 76.

Moore Ex. v. People ex rel., 106 Ill. 376 (Af.). Section 32.

People ex rel. v. Chapman Classification, 127 Ill. 387 (R. R.).

Boul. v. People ex rel., 127 Ill. 240 (Af.).

People ex rel. v. Chapman et al., 128 Ill. 496 (R. R.).

Tucker v. People ex rel., 156 Ill. 108 (Af.).

Organization of district attacked collaterally.

“If the district was not organized according to law, and the drainage commissioners attempt to exercise power which had not been legally conferred upon them, these are questions that can only be raised by a direct proceeding.”

LEVEE ACT

LEVEE ACT	{	ORGANIZATION.	{ Successful Direct Attack Unsuccessful Direct Attack
		ASSESSMENTS.	{ Successful Direct Attack Unsuccessful Direct Attack
		ASSESSMENTS.	{ Successful Collateral Attack Unsuccessful Collateral Attack

## ORGANIZATION

## RIGHT TO WITHDRAW SIGNATURE FROM PETITION

On an application by petition to the board of supervisors to create a new town, it was held that a person signing the petition might withdraw his name before the jurisdiction of the county board had been determined. Signing a petition not an irrevocable act and name may be withdrawn before the jurisdiction of the body addressed has been determined. *Littell et al. v. Vermilion, County of*, 198 Ill. 205 (Af.).

Petition to change the county seat certiorari. Same ruling on the right to withdraw signature. *Kinsloe et al. v. Pogue et al.*, 213 Ill. 302 (Af.).

On an appeal from the action of the commissioners of highways laying out a road to three supervisors nineteen signers petitioned to have their names withdrawn. Held that the motion came too late. *Comrs. of Highways of Tolono et al. v. Bear et al.*, 224 Ill. 259 (Af.).

Certain persons had leave to withdraw their names from a petition to abandon and abolish the district. *Boston, Plaintiff in Error v. Kickapoo Drainage District*, 244 Ill. 577 (Af.).

*Sny Island Drainage District, Defendant in Error v. Dewell et al.*, 256 Ill. 126 (R.). Here some of the petitioners to organize a sub-district had leave to withdraw their names from the petition. Held that the court was left without jurisdiction. To meet the holding in these cases the legislature, 1907, page 276, amended sec. 4 of the Levee Act, to provide that on the hearing names could not be withdrawn without the consent of a majority of the other petitioners unless it could be shown to the satisfaction of the court that the signatures had been obtained by fraud or misrepresentation. In *Boston, Plaintiff in Error v. Kickapoo Drainage District*, 244 Ill. 577 (Af.), this provision did not apply to a petition to abandon the work.

SUCCESSFUL DIRECT ATTACK

Dettmer et al., Appellee v. Ill. Term. R. R. Co., 287 Ill. 513 (R. R.). (Levee.)

Funkhouser et al. v. Randolph et al., Appellees, 287 Ill. 94 (Af.).

Sangamon & Drummer Drain. Dist., Appellee v. Houston et al., 284 Ill. 406 (R. R.). (Levee.)

Kohl et al., Appellants v. Chouteau Island Drain. Dist. et al., 283 Ill. 69 (Af.). (Sub-Dist.)

Borah Drain. Dist., Def. in Err., v. Ankenbrand et al., 279 Ill. 488 (R. R.). (Levee.)

Borah Drain. Dist., Def. in Err. v. Ankenbrand et al., 277 Ill. 132 (Demurrer to First Plea Overruled; other Dem's Sust.).

Inlet Swamp Drain. Dist., Appellees v. Cooper, 274 Ill. 77 (R. R.). (Levee.)

Sny Island Levee Drain. Dist., Appellant v. Boyd Levee & Drain. Dist. et al., Appellee, 273 Ill. 533 (R. R.). (Levee.)

Goudy et al., Appellants v. Mayberry et al., 272 Ill. 54 (Af.). (Levee.)

Inlet Swamp Drain. Dist., Appellee v. Glein et al., 272 Ill. 551 (R. R.). (Levee.)

Borah Drain. Dist., Def. in Err. v. Ankenbrand et al., 260 Ill. 335 (R. R.). (Levee.)

Lingle, Appellant v. Adams et al., 259 Ill. 522 (Af.). (Levee.)

Lower Salt Fork Drain. Dist., Appellant v. Smith, 257 Ill. 52 (Af.). (Levee.)

Sny Island Levee Drain. Dist., Def. Err. v. Dewell et al., 256 Ill. 126 (R.). (Levee.)

Drummer Creek Drain. Dist. et al. Def. Err. v. Roth et al., 244 Ill. 68 (R. R.). (Levee.)

Dewell et al Pl. in Error v. Sny Island Levee Drainage Dist., 232 Ill. 215 (R. R.). Writ of certiorari. Organization of a sub-district under section 59 held illegal be-

cause it included "other lands than those of the petitioners and those over which the proposed ditches were sought to be constructed."

See section 59 amended in 1909, p. 194, to meet this holding.

See 256 Ill. 126 for a construction of section 59 as amended.

See page 46 of 236 Ill. on purpose, scope and object under the constitution of a drainage district.

Aldridge et al., Pl. in Error v. Clear Creek Drainage and Levee District et al., 253 Ill. 251 (R. R.).

Tennessee Drainage Dist. et al., Def. in Error v. Moyer et al., 258 Ill. 296 (R. R.). Notice required by statute not given.

Merkle Drainage Dist., Def. in Error v. Hathaway et al., 260 Ill. 186 (R. R.). Held court lost jurisdiction because after appointing commissioners there was no order of continuance as required by statute.

Wayne City Drainage Dist., Def. in Error v. Boggs et al., 262 Ill. 338 (R. R.). Petition not sufficient to confer jurisdiction.

#### UNSUCCESSFUL DIRECT ATTACK

Inlet Swamp Drain. Dist. v. Gehant et al., Appellants, 286 Ill. 558 (Af.).

Hansmeyer et al., Appellants v. Indian Creek Drain. Dist., 284 Ill. 458 (Af.).

Burroughs et al., Pl. in Err. v. Donner et al., 282 Ill. 299 (Af.). (See Remark on Bill of Exceptions.)

Koeller et al., Def. in Err. v. Salisbury, 276 Ill. 230 (Af.).

Donner et al., Appellants v. Board of Highway Com'rs et al., 278 Ill. 189 (R. R.).

Stokes et al., Pl. in Err. v. Bay Bottoms Drain. Dist., 278 Ill. 390 (Af.).



Union Drain. Dist. No. 3 et al., Appellees v. Ullrich, 273 Ill. 165 (Af.).

Wood et al., Appellants v. Papendick et al., 268 Ill. 383 (R. R.).

Fountain Creek Drain. Dist. No. 1 v. Smith et al., Pl. in Err., 265 Ill. 138 (Af.).

Ziegler et al., Appellees v. Gilliatt et al., 263 Ill. 587 (Af.).

Bissell et al., Appellants v. Edwards River Drain. Dist. et al., 259 Ill. 594 (Af.). (Section 44, Levee Act, conditions under which work and district can be abandoned.)

Aldridge et al. v. Matthews et al., Appellees, 257 Ill. 202 (R. R.).

Sangamon & Drummer Drain. Dist. v. Eminger et al., Appellants, 257 Ill. 281 (Af.).

Bainum, Appellant v. Randolph Drain. Dist., 257 Ill. 486 (Af.).

Gar Creek Drain. Dist. v. Wagner et al., Appellants, 256 Ill. 338 (Af.).

Bay Island Drain. & Levee Dist., Appellant v. Union Drain. Dist., 255 Ill. 194 (Af.).

Gauen et al. v. Moredock & Ivy Landing Drain. Dist., 131 Ill. 446.

#### ATTACK IN EQUITY

Point.—A jury charged with the duty of assessing benefits can not hold that some lands will not be benefited. The boundaries of the field of assessments are fixed by the order of organization.

Aldridge et al., Appellant v. Mathews et al., 257 Ill. 202 (R. R.).

Where the rights of the public are involved the right to administer the duties of an office can only be tested by a quo warranto.

Trumbo v. People, 75 Ill. 561 (Af.). (Judgment for school tax.)

Osborn v. People, 103 Ill. 224 (Af.). (Assessment for a drain.; judgment sustained.)

Blake v. P., 109 Ill. 504 (Af.).

#### SUB-DISTRICTS

Sec. 59 of the Levee Act (Ses. Laws 1885, p. 135) provided: That, if on the application of some owner or owners of land in the district, it shall appear to the commissioners that additional ditches, drains, outlets or other work over other lands, are needed in order to afford complete drainage by outlets, or protection to some particular tract or tracts of such owner, it shall be the duty of the commissioners to examine such land and make plans, etc.

In 1903 this section was amended (pages 162-3) providing that the court should declare the land "organized into a sub-district and all assessments should be kept in a separate fund. This amendment is referred to in Soran v. Union Drainage Dist. No. 1 et al., 215 Ill. 212 (Af.).

Sec. 59 was first passed upon and construed in Dewell et al., Plaintiff in Error v. Sny Island Levee Drainage Dist., 232 Ill. 215 (R. R.). (Certiorari.) In this case it was held that the statute only authorized including in the district the land of the petitioners and the land over which the drain would pass. To meet this holding, 59th section was amended in 1909. See Sny Island Drainage Dist. v. Dewell et al., Pl. in Error, 256 Ill. 126 (R.).

#### ASSESSMENT

##### SUCCESSFUL DIRECT ATTACK

Inlet Swamp Drainage Dist., Appellee v. Gehant, 284 Ill. 180 (R. R.). (Levee.)

Cache River Drain. Dist., Appellee v. Chi. & Eastern Ill. R. R. Co., 264 Ill. 97 (R. R.).

Clear Creek Drain. & Levee Dist., Appellee v. St. Louis,

Iron Mountain & Southern Ry. Co. et al., 264 Ill. 640 (R. R.).

Brooks et al., Appellees v. Hatch et al., 261 Ill. 179 (R. R.). (In pt.)

Hartwell Drain. & Levee Dist., Appellees v. Mickelberry, 257 Ill. 509 (R. R.).

Cache River Drain. Dist., Appellees v. Chi. & Eastern Ill. R. R. Co., 255 Ill. 398 (R. R.).

Kickapoo Drain. Dist., Def. Err. v. Jackson et al., 255 Ill. 504 (R. R.).

Vandalia Levee & Drain. Dist., Def. Err. v. Vandalia R. R. Co. et al., 247 Ill. 114 (R. R.).

Sangamon & Drummer Drain. Dist., Def. in Err. v. Ill. Cent. R. R. Co., 272 Ill. 374 (R. R.).

Little Beaver Drain. Dist., Def. Err. v. Livingston et al., 270 Ill. 582 (R. R.).

Moredock & Ivy Landing Drain. Dist., Appellees v. Meyer et al., 253 Ill. 306 (R. R.).

Commissioners of Union Drainage Dis., Appellant v. Smith et al., 233 Ill. 417 (Af.). "Sections 16 and 37, in so far as they appear to confer upon the court the power to direct one of the commissioners of a drainage district to act with the other commissioners in *assessing benefits when the lands of the first mentioned commissioner are or may be subject to assessment, are in violation of section 2 of article 2*" of the constitution.

Ginn v. Moultrie, Coles et al., 188 Ill. 305 (R. R.).

Mich. Cent. Railroad Co. v. Spring Creek Drainage Dist., 215 Ill. 501 (R. R.).

Sections 16, 17, 19, 20 and 21-37, so far as they provided for commissioners assessing damages are unconstitutional.

West Skokie Drain. Dist., Appellee v. Dawson et al., 243 Ill. 175 (R. R.). Reversed for error of instruction to jury.

Hull v. Sangamon River Drainage Dist., 219 Ill. 454 (R. R.).

It was here contended that the commissioners could assess benefits and leave damages to be determined under the Eminent Domain Act.

It was held that the question whether there was damages inflicted upon the land entered into the equation of benefits and that the commissioners were not competent, but a jury was to make the determination.

Petition filed under the levee act to organize a drainage district called "Spring Creek Drainage District." Certain lots belonging to the City of Joliet were assessed and certain streets in the City of Joliet were assessed. The county court confirmed the assessment roll and ordered that the assessment be paid in ten annual installments.

The city excepted to the order of the court and prayed an appeal.

It was held that the levee act did not give the drainage district any authority to assess benefits against the city. Section 55 is referred to and the court says that it contains no such grant of power to the district.

This case is an authority on the point: That the jury under the eminent domain act can find whether land not taken is damaged. The jury stop there; the commissioners can then take up the question whether any benefits will accrue to the said land not taken. *Joliet, City of v. Spring Creek Drainage Dist.*, 222 Ill. 441 (R. R.). Opinion filed 1906. The legislature, in 1909, p. 193, amended section 55, levee act, saying: "Commission could apportion benefits to the municipality in the case of streets."

Following *Littell et al v. Board of Supervisors of Vermilion County*, 198 Ill. 205, it is held that petitioners may withdraw their names any time before the court has acquired full and complete jurisdiction of the case. A petition was filed under the Levee Act January 8, 1903, in county court. Hearing set for February 5, 1903, and notices given by the clerk. At this hearing five of the signers filed written statement withdrawing their names. As the court had not acquired jurisdiction, it was error to

refuse application to withdraw names. *Mack et al. v. Polecat Drainage Dist.*, 216 Ill. 56 (R. R.).

*Wabash Railroad Co. v. Coon Run Drainage and Levee Dist.*, 194 Ill. 310 (R. R.). Secs. 17, 19, 20 and 21 of the Levee Act unconstitutional because they do not provide for the property owner having the common law right to examine the jury and test their fitness to sit as jurymen.

*Juvinall et al. v. Jamesburg Drainage Dist.*, 204 Ill. 106 (R. R.).<sup>1</sup>

*Michigan Cent. Railroad Co. v. Spring Creek Drainage Dist.*, 215 Ill. 501. There are two methods for estimating benefits and damages, one is by a jury, Secs. 16 to 21, the other by commissioners under Sec. 37. Both are unconstitutional.

*Hutchins v. Vandalia Levee and Drainage Dist.*, 217 Ill. 561 (R. R.).

In this case commissioners were appointed, who fixed the amount of the benefits and damages in money. The land owner objected and the court without ruling upon the objections directed that a jury be drawn under the Eminent Domain Act.

The jury brought in a verdict. A motion was made for a new trial; motion made for an arrest of judgment. Motion overruled and exception saved.

The point of reversal was: That there was no petition filed as required by the Eminent Domain Act saying, among other things, that the corporation could not agree with the owner, etc. The court therefore had no jurisdiction. *Trigger case*, 193 Ill. 230, referred to.

*Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Polecat Drainage Dist.*, 213 Ill. 83 (R. R.).

Here the drainage district filed a petition under the Eminent Domain Act to condemn right of way over the railroad right of way. It was reversed for error of an instruction.

1—This decision led to amendment of sec. 37 in 1909; 1905 led to amendment of 1909, sec. 37.

## PETITION INDEFINITE

Iroquois and Crescent Drainage Dist. v. Harroun et al., 222 Ill. 489 (Af.). Attack sustained because petition for an additional assessment did not "fix with sufficient definiteness the location of the extension of this outlet, so that the objectors or other owners can tell with certainty just how and where it crosses their lands and no scale is given on the plat and no courses and distances are given."

Spring Creek Drainage Dist., Appellee v. Elgin, Joliet and Eastern Railway Co. et al., 249 Ill. 260 (R. R.).

Here the court says that the second provision (amendment to Sec. 55, Levee Act 1909, p. 193) in so far as it attempts to create a lien upon all the property of a railroad company is unconstitutional.

The cause was reversed because a street railroad running through the district was not assessed.

Joliet, City of v. Spring Creek Drainage Dist., 222 Ill. 441 (R. R.). Opinion filed October 23, 1906.

This case was reversed because nowhere in section 55 of the Levee Act are streets of an incorporated village mentioned and provisions made for their assessment by a drainage district.

Section 37 *Which relates to the Construction of New Work and the Repair of Old Work.*

Since the first enactment of the Levee Act, section 37 has been amended in 1885 (Ses. Laws, p. 124), 1907 (Ses. Laws, p. 280) and 1909 (Ses. Laws, p. 192).

The holding of the Supreme Court (Wabash case, 194 Ill. 310), and the (Juvinal case, 204 Ill. 106), that the substitution of the commissioners in the matter of assessing "benefits and damages" for a common law jury was unconstitutional has led to another amendment of section 37, wherein the obnoxious clauses are eliminated and new ones added which need special examination. See Ses. Laws, p. 368, 1917.

UNSUCCESSFUL DIRECT ATTACK

See eight points considered in *Smith et al. v. Claussen Drainage Dis.*, 229 Ill. 155 (Af.).

*Hadley Creek Sub-Dist., Appellee v. Chicago, Bur. & Q. R. R. Co.*, 284 Ill. 354 (Af.).

*Hunt Drain. Dist., Appellee v. Cole*, 283 Ill. 105 (Af.).

*Freesen et al., Pl. Err. v. Scott County Drain. & Levee Dist.*, 283 Ill. 536 (Af.). (See Sec. 37.)

*North Richland Drain. Dist. v. Karr et al., Pl. in Err.*, 280 Ill. 567 (Af.).

*Brooks et al., Appellees v. Hatch et al.*, 265 Ill. 346 (Af.).

*Meridian Line Drain. Dist., Appellee v. Wiss et al.*, 258 Ill. 600 (Af.).

*Inlet Swamp Drain. Dist., Appellee v. Anderson et al.*, 257 Ill. 214 (Af.).

*Sny Island Levee Drain. Dist., Def. in Err. v. Shaw et al.*, 252 Ill. 142 (Af.).

*Vandalia Levee and Drain. Dist., Appellee v. Hutchins et al.*, 252 Ill. 259 (Af.).

*Meredosia Lake Drain. & Levee Dist. et al., Appellants v. Evemeyer et al.*, 244 Ill. 115 (R. R.).

*Lovell v. Drainage Dist.*, 159 Ill. 188 (Af.). Third assessment confirmed. Action of court on two prior ones is *res adjudicata*.

SECTION 37

ADDITIONAL ASSESSMENTS TO COMPLETE WORK OR DO REPAIRS

*Collateral Attack*

*Frank et al v. Rogers*, 220 Ill. 206 (R. R.).

Additional work was attempted to be provided for.

The point of objection was that the notice required to be given by section 3 was fatally defective because it was published before the petition was filed with the justice.

The notice was not signed by the justice before whom the petition was to be filed.

It was held that the giving of notice as provided by the statute was mandatory and thus this class of cases is differentiated from 217 Ill. 220, where the record itself failed to show that the court did not have jurisdiction. In this case the record did show within its four corners that it did not have jurisdiction; that is, that the notice required by statute had not been given.

The assessment was also void because the justice under section 48 had no jurisdiction to entertain the petition because the repairs sought to be performed were or rather exceeded \$2,000.

#### SUCCESSFUL COLLATERAL ATTACK

People ex rel., Appellant v. Bonham et al., 286 Ill. 286 (Af.).

Moore, Appellant v. Gar Creek Drain. Dist. et al., 266 Ill. 399 (R. R.). (Reversed in favor of complainant to Bill in Equity.)

People ex rel., Appellee v. Cairo, Vincennes & Chi. Ry. Co., 256 Ill. 432 (R. R.).

Morgan Creek Drain. Dist., Def. in Err. v. Hawley et al., 255 Ill. 34 (R. R.).

Payson v. People ex rel., 175 Ill. 267 (R. R.).

The organization was successfully attacked because no notice of proposed organization of drainage district was given to the land owner who objected. The evidence showed that none, in fact, was given.

The right to appoint commissioners, under section 5, p. 112, Laws of 1885, to determine upon damages and benefits is contingent on the *court finding and entering of record* that the petition is signed by the legal number of land owners.



UNSUCCESSFUL COLLATERAL ATTACK UPON AN ASSESSMENT

People ex rel. Def. in Error v. Leavens, et al., 288 Ill. 477 (Af.).

Kickapoo Drainage Dist., Def. in Error v. Mattoon, City of, 284 Ill. 393 (Af.).

This was mandamus to compel the payment of an assessment. With reference to section 37 of the Levee Act the court says: "The purpose of section 37 is to enable the commissioners of a drainage district already organized, with boundaries already established and well known to all the land owners of the district, to do additional work, and the notice therein required is for the purpose of informing the property owners or persons or municipalities to be assessed, of the character of the additional work to be done, the starting point, route and termini of the proposed additional work if it consists of additional drains or ditches, so the parties may know whether they desire to file objections; and the notice should also state in what court and at what term thereof the petition was filed and at what term a hearing will be had on the petition, so that any person desiring to object may know when and where to appear."

Examine this opinion.

East Side Levee and Sanitary Dist., Appellant v. Alton and Southern Railroad, 281 Ill. 372 (R. R.). Important case on the right of a drainage district to cross the right of way of a railroad company. See opinion.

People ex rel. Appellant v. Leonard et al., 279 Ill. 159 (R. R.).

Sub districts and sections 37 and 59 are here referred to.

DEFINITION OF DUE PROCESS OF LAW

Com'rs of Union Drainage Dist. No. 1, Appellants v. Smith et al., Appellees, 233 Ill. 417 (Af.).

## SECTION 44

## ABANDONING WORK

At any time before the contract shall have been made for the construction of any drain, ditch, levee or other work provided for in the report of the commissioners, or the order of the court made in pursuance thereof, which is sought to be abandoned as hereinafter provided, upon the petition of the majority of the adult land owners of the district, representing one-third in area, the court may, if upon due inquiry it shall be satisfied that justice toward all land owners require it, direct the commissioners to abandon any drain, ditch, levee or other work, or any part thereof, mentioned in such report or order.

McCaleb et al v. Coon Run Drainage and Levee Dist., 190 Ill. 549 (Affirmed in part and remanded).

A petition signed by a majority of the land owners.

The main point in the petition was: That the main ditch would run through Dickerson lake; that its bottom was quicksand, that would have a tendency to cave in and cause an expense in constructing and keeping up the drain that would cost more than the value of the land attempted to be drained.

The court says that the testimony support the decree of the court denying the petition to abandon the work. This was a writ of error also to review the action of the lower court in confirming the allowance of damages to and assessments upon the land of two men whose lands were within the bounds of the district.

Question of Practice: In determining the amount of benefit to a tract of land over which the ditch was to pass, the amount of damage to the owner for land taken was deducted.

The supreme court, following Ginn v. Moultrie, etc., Drainage Dist., 188 Ill. 305, held that though this was error, it had been waived, as no objection was made below, as was done in 188 Ill. 305.

This case was reversed on account of an erroneous instruction. The jury were instructed that it was the duty of the commissioners to construct farm bridges to render more useful the lands through which the ditch would be cut and that the jury might take this fact into consideration in determining the amount of benefits and damages respectively. In the levee act there is no such provision, as there is in the farm drainage act. See section 74, 1885, p. 106.

In *Boston, Plaintiff in Error v. Kickapoo Drainage Dist.*, 244 Ill. 577 (Af.), it was held that the petition to abandon the work did not contain the one-half of the acreage as required by the statute in consequence of some one of the petitioners withdrawing her name.

In *Soran v. Union Drainage Dist. No. 1 et al.*, 215 Ill. 212 (Af.), it was held that the said section 44 did not apply to a sub-district, but only to the original drainage system or scheme. Here a motion was sustained that struck from the files a petition to abandon additional work in a sub-district.

## CHAPTER XXV

### STATE PUBLIC UTILITIES COMMISSION LAW PASSED BY THE 48th GENERAL ASSEMBLY 1913, TOOK EFFECT JANUARY 1, 1914

#### STATE PUBLIC UTILITIES COMMISSION LAW

##### FOREIGN SOURCES

Various clauses of the statute have been borrowed in part or whole from similar ones in New York, New Jersey, Pennsylvania, Massachusetts, Indiana, Wisconsin and the United States act to regulate commerce.

##### ORGANIZATION OF THE COMMISSION

The commission is made up of five members, appointed by the governor, with the advice and consent of the senate, not more than three to be of the same political party. The term of service is six years, after the respective dates—March, 1915-1916, and 1917. The commission chooses its own secretary and counsel. Various other officers, engineers, experts, accountants, clerks, etc., are appointed by the commission but require the approval of the governor. The salary of each commissioner is ten thousand dollars with a prohibition against engaging in any other business. The salary of the secretary is \$5,000 and counsel \$8,000. The salary of employees is fixed by the commission subject to the approval of the governor.

The office of the commission is at Springfield in the state capitol; open through the year between the hours of 8 A. M. and 5 P. M. Stated meetings to be held every month, and, as necessity requires, at any place within

the state. In the selection of employees, the commission is governed, with the exception of attorney, chief engineer, chief accountant, one private secretary or stenographer and such others as are exempt, by the Civil Service Act of the State of Illinois.

Its acts are authenticated by seal, of which judicial notice is taken by all courts in the state.

#### GENERAL POWER OF THE COMMISSION

The dominant words, on the side of the commission, that run through the statute are: "hearings," "findings," "discretion," "deemed necessary," "may," "shall," "own motion," "complaint."

The commission's power, as between the people and the corporations, are directory, supervisory, inquisitorial and mandatory.

It is to keep itself informed generally as to franchises, capitalization, rates, charges, ownership, control and operation of public corporations; make written reports thereon to the Governor, when directed; make rules governing its proceedings; confer with the Inter State Commerce commission; hear evidence with reference to pending legislation, if requested by General Assembly, and make report; prescribe rules to be observed by utility companies in publishing rates; fix rates for "any service product" or "commodity" or rate of fare—determine the just, reasonable or sufficient or other charge; supervise and control public utilities in their issue of stocks, stock certificates, bonds, notes, and other evidences of indebtedness and the creation of liens on property; "examine their books, papers, accounts, documents, make a physical valuation of their property; require public utilities to give an account of their sales of stocks, bonds, etc.; authorize and limit capitalization; adjust rates, through and joint, between two or more common carriers within this state; make orders requiring railroads, or street rail-

road companies, to increase the number of its trains, its cars, change its stopping places, its motive power; investigate accidents that occur in this state on the property of a public utility; make rules to be observed by public corporations to safeguard the public health and safety; determine when and where grade crossings shall obtain.

#### PEOPLE'S RIGHTS

The dominant words, running through the statute on the side of the people are—"unjust," "unreasonable," "unsafe," "improper," "inadequate," "insufficient," "speedy notice to the commission of accidents occasioning loss of life or limb."

Individuals have a right to complain in writing to the commission that any public utility "has charged an excessive or unjustly discriminatory amount for its product or service." If the complaint is found to be true, the public utility can be ordered to make reparation, and, if it does not comply, the individual can bring suit and recover a reasonable attorney's fee, if the complaint is finally sustained.

#### INHIBITIONS

No public utility to charge (more than schedule rates) refund or remit any portion of rate, nor extend any privilege, give any preference or advantage to (one person) not regularly and uniformly tended to all—corporations and persons—(alike.)

#### COMMISSION SET IN MOTION

Through the commission is always open to receive complaints from individuals and corporations alike, it can act in nearly all, if not all, cases upon its own motion.

When, however, complaints in writing are filed, copies are served upon the person or corporation complained of,

accompanied with a notice, requiring an answer to the complaint within a time fixed—giving notice of time and place where hearing can be had. The subsequent proceedings follow, as near as may be the practice of courts of chancery, with the exception, that the technical rules of evidence need not be observed. Witnesses, with or without books and papers, may be summoned and their obedience, to writs served upon them, may be enforced by application to “any circuit court of this state or any judge thereof.”

A stenographic record of all evidence taken is preserved, and parties are entitled to be heard in person or by attorney.

From the final disposition of complaints, by the commission an appeal may be taken by either side, to the circuit court of Sangamon county, subject to review by the Supreme Court.

#### PUBLIC UTILITY DEFINED

Section 10 defines the term “public utility.” The Monarch Refrigerating Company, a corporation doing a general warehouse business in the City of Chicago, was required by the commission to post a schedule of rates, as provided in sections 33 and 34 of the act. On appeal to the circuit court the order of the commission was affirmed. The contention before the supreme court was: That the Public Utilities Commission erred in assuming appellant’s (Monarch Refrigerating Company) business is a public utility; that the power to enter the order had not been granted to the commission; that the legislature had not delegated to the commission the power to fix rates, etc.

The court held after an examination of the evidence in regard to the nature and present management of the business, that there was impressed upon it a public char-

acter sufficient to bring it within the supervision of the commission.<sup>1</sup>

The Macon County Telephone Company prevailed upon the commission to order the Mutual Telephone Association to desist from constructing its telephone system until it had obtained a certificate of convenience, etc. The Supreme Court reversed the order because the system to be constructed was for private use, and in so holding observes: "The appellant under its charter has no authority to engage in the public service or to devote its property to the public use. Aside from the statutory definition, the term 'public utility' implies a public use, carrying with it the duty to serve the public and treat all persons alike, without discrimination, and it precludes the idea which is private in its nature whether for the benefit and advantage of a few or many."<sup>2</sup>

The definition of "common carrier" in section 10 of the act does not include one who carries and transfers baggage in a city as an ordinary expressman.<sup>3</sup>

"The term 'public utility' means and includes every corporation that now or hereafter may own, control, operate or manage within the state, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons between points within the State."<sup>4</sup>

#### VALIDITY OF THE ACT SUSTAINED

The Public Utilities Act has been assailed on the ground that it violated section 4 of article 11 of the con-

1—State Public Utilities Com. v. Monarch Refrigerating Co., 267 Ill. 528.

2—Pub. Utilities Com. ex rel. v. Bethany Mut. Tel. Ass., 270 Ill. 183; Public Utilities Com. ex rel. v. Okaw Valley Mut. Tel. Ass., 282 Ill.

336; Public Utilities Com. ex rel. v. Noble et al., 275 Ill. 121; Bartee Tie Co. v. Jackson, 281 Ill. 452.

3—Chicago, City of v. Mayer, 290 Ill. 142.

4—Public Utilities Com. v. Bartonville Bus. Line, 290 Ill. 574.



stitution, because it gave to the commissioners the right to fix "rates;" because its procedure provided by article 5 is not according to the course of the common law or of the State and Federal constitutions (because it restricted the right to have the writ of supersedeas issue;<sup>5</sup> because section 37 giving the commission the power to regulate the charges that public service corporations should charged impaired the obligation of contracts within the meaning of the federal constitution;<sup>6</sup> because section 50 and 59 providing that the commission under certain circumstances can order constructed "new or additional structures" and the exercise of the right of eminent domain were unconstitutional; but in all these instances it has been held not open to the objections made.

Section 55 provides that the construction of any "new plant equipment, etc.," by any public utility shall be contingent on first obtaining from the commission "a certificate that public convenience and necessity require such construction."

Further it provides that "no public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this state at the time this act goes into effect shall transact any business in this state until it shall have obtained from the commission that public convenience and necessity require the transaction of such business."

When the commission has attempted to act under this section its orders have been reversed when there has been a failure to carefully distinguish between corporations whose business was for the benefit of a limited number of the public rather than the general public.<sup>7</sup> And too its

5—Public Utilities Com. ex rel. et al. v. Chicago & West Towns Railway Co. et al., 275 Ill. 555; Chicago, City of, et al. v. O'Connell et al., 278 Ill. 591.

6—Hite v. C. I. & W. R. Co. et al., 284 Ill. 297.

7—Public Utilities Com. ex rel. v. Bethany Mutual Tel. Ass., 270 Ill. 183.

order has been reversed, when it has failed to recognize that changes or improvements made were extensions of existing and not the establishing of new business.<sup>8</sup>

**POLICE POWERS OF THE LEGISLATURE ARE VESTED IN THE STATE  
PUBLIC UTILITIES COMMISSION**

On September 29, 1915, the State Public Utilities Commission entered an order relating to the equipment and operation of the street cars in the city of Chicago. The details of the order are set out in the opinion of Mr. Justice Cooke on pages 593-4 of the 278 Ill. This order was assailed in equity by the City of Chicago, the Chicago City Railway Company et al. The grounds of attack were: Section 4, article 11 of the constitution grants to cities power to control street railways upon their streets and section ten of the Public Utilities Act excludes from the operation of the act public utilities in which a city has an interest; that the enforcement of the order would amount to taking property without due process of law and in violation of the 14th amendment to the Federal constitution and section 13 of article 2 of the State constitution; that the enforcement of the order would also impair the "obligation of contracts existing between the city and the railway companies and bondholders of the railway companies in violation of section 14 of article 2 of the constitution."

These various questions were presented to the Supreme Court through the medium of the bill, across bills and the demurrers interposed by the State Public Utilities Commission and its members. The decree of the circuit court overruling the demurrer was reversed.

The court, after an examination of section ten of the act and a reference to the leading case of *Munn v. People*,

8—Public Utilities Com. et al. v.  
Postal Tel.-Cable Co., 285 Ill. 411.

69 Ill. 80, observes: "The regulation of public utilities is one phase of the exercise of the police power of the state. The police power may be exercised by the legislature directly, or it may be exercised indirectly by conferring the power upon agencies created by the legislature. The power is an attribute of sovereignty and is primarily vested in the legislature, which has the right to recall it at any time from the agency to which it has been delegated and after being recalled to retain it or confer it upon some other agency of government. In the exercise of this power the state may interfere when ever the public interests demand such interference, and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require but what measures are necessary for the protection of such interests. \* \* \* A rightful exercise of the police power is not a violation of any of the provisions of the constitution upon which appellees rely."

To the point made by appellee that the order of the commission was unreasonable, the answer is: Be that as it may, the order is not subject to collateral attack.<sup>9</sup>

#### PRACTICE

On December 7, 1914, the State Public Utilities Commission in response to a petition filed by the Peoria State Hospital ordered the Peoria and Pekin Union Railway Company "to cease all discrimination relative to the shipment of coal or other commodities over a certain railroad track from its main line to the Peoria State Hospital." It was developed in evidence by the railway company before the commission, that its action was controlled by and in obedience to a writ of injunction that had been issued, upon a bill filed by Sholl Bros., in March, 1914.

<sup>9</sup>—Chicago, City of, et al. v. & St. P. Ry. Co. v. Lake, County of, O'Connell et al., 278 Ill. 591; C. M. 287 Ill. 337.

In holding the order of the commission erroneous the court observes: "The commission had no jurisdiction to order the railway company to do what the decree of the circuit court enjoined it from doing. \* \* \* The State Public Utilities Commission is not a court, but is an administrative commission charged with the performance of certain executive and administrative duties. The law does not authorize it to ignore the decrees of courts in matters coming before it, where the courts had jurisdiction of the subject matter and the parties. Its powers are subject to the action of the courts in matters of which they had jurisdiction." <sup>10</sup>

The question arose between the New York Central Railroad Company and the Secretary of State whether section 31 of the act which provides that "the commission shall charge every public utility receiving permission under this act for the issue of stock, etc., an amount equal to ten cents for every hundred dollars of such securities authorized, etc.," repealed by implication 10a, 10b and 10c, chapter 53 of the Incorporation Fee Act. In holding that there is such a repeal the court observes. "In our view the decision of the case depends upon what the intention of the legislature was in the passage of the Public Utilities Act, especially section 31. Prior to the passage of the Public Utilities act the State reserved no visitorial and regulatory powers over corporations created by it. The act gives the commission supervision of the issuance of stocks, stock certificates, etc. \* \* \* The commission is given authority to grant permission for the issue of stocks etc., in the amount applied for, or a lesser amount, or not at all, and may attach to the exercise of the permission such conditions as it may deem reasonable and necessary." <sup>11</sup>

10—People ex rel v. Peoria & Peoria Union Railway Co., 273 Ill. 440.

11—New York Central Railroad Co. v. Stevenson, 277 Ill. 474.

## COSTS FOR TRANSCRIPT. NOT NECESSARY TO BE ADVANCED

On April 30, 1917, the commission entered an order upon the complaint of A. G. Kennedy and others. The question was, whether the secretary was entitled to have advanced to him by appellants Kennedy and others \$225 approximate costs for making up the record for review in the circuit court.

In sustaining the circuit court's order to file the transcript of the record without the advancement of the fee, the Supreme Court observes: "The purpose of the act, as declared in the title, is regulation of public utilities, and the whole object of the act is to secure to the public proper and efficient service by public utilities at uniform and reasonable rates. To accomplish that object the act takes from public utilities and the persons served by them the right to make their own contracts and authorizes the commission to fix reasonable rates to protect and conserve the public interest. The act authorizes a complaint by any person that the rate charged for service is unjust and unreasonable. The amount involved as to one or several persons complaining of an unreasonable rate may be, and ordinarily is, very small, and the burden of making the complaint and having a hearing necessarily involves considerable expense. \* \* \* It ought not to be presumed that the General Assembly intended to add to the necessary burden and expense the payment of a substantial sum of money as fees to the commission for the privilege of having a judicial determination whether its order is lawful or reasonable."<sup>12</sup>

## JURISDICTIONAL FACTS

## PUBLIC CONVENIENCE AND NECESSITY. SECTION 55

The board of trade of the City of Chicago prevailed upon the commission to order the Toledo, St. Louis and

12—Kennedy et al. v. State Public  
Com., 286 Ill. 490.

Western Railroad Company to put into effect "joint rates for all grain moving in carload lots" from certain points on its line to the city of Chicago. The Supreme Court in reversing the order use the following language, in characterizing the record that the commission is required under the statute to make and preserve as evidence of its orders: "Appellee contends that if it be necessary to prove the existence of public necessity and convenience there is evidence in the record to sustain the order. The only evidence in the record referred to by appellee as establishing those facts is the order made by the commission in this case, and it is directly challenged and sought to be set aside on this appeal because not supported by the evidence. Such an order, when directly attacked on appeal, can not stand unless there is some competent evidence in the record forming a substantial basis for the order. The findings of the Public Utilities Commission have the force and effect of reports of special masters in courts of equity and are conclusive on the courts unless manifestly against the evidence. If the findings of the commission are not supported by the evidence the court is authorized to set aside the order."<sup>13</sup> Here it is held that there must be evidence in the record of "what public convenience and necessity demand," as this is a jurisdictional fact.

The extent to which the Supreme Court will go in reviewing the facts in a transcript of the record of the commission is stated as follows: "The statute makes the commission's findings of fact *prima facie* true, and its orders and decisions are not to be set aside unless clearly against the manifest weight of the evidence. It is not sufficient, to justify a reversal of a reasonable order of the commission made in the lawful exercise of its power, that a court of review should be of the opinion the order was unwise

13—State Public Utilities Com. ex rel. v. Toledo, St. Louis and Western Railroad Co., 286 Ill. 582.

or inexpedient. Reviewing courts will examine the facts upon which the order is based, and if there is substantial evidence to sustain the order,—not a mere scintilla of proof,—the order will be sustained.”<sup>14</sup>

## TABLE OF CASES

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State Public Utilities Com. ex rel. Alton & Southern R. R. Co. v. Vandalia R. R. Co., 272 Ill. 30 (Af.).

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State Public Utilities Com. ex rel. Farmers Grain Dealers Ass. et al., Appellee v. At., Top & Santa Fe Ry. Co. et al., 278 Ill. 58 (R. R.).

Leonard, Appellant v. Metropolis, City of, 278 Ill. 287 (R. R.).

Chicago, City of, et al., Appellees v. O'Connell et al., 278 Ill. 591 (R. R.). Bill to restrain commission from enforcing a certain order relating to the operation of street cars in the city of Chicago. Demurrers to bill overruled. Commission and other defendants stood by the demurrer and appealed.

C. B. & Q. R. Co., Appellant v. Cavanagh et al., 278 Ill. 609 (R. R.). Railroad company attempted to exercise the power of eminent domain under and by virtue of an order of the State Public Commission. Property owners attack the validity of the order. Unsuccessful.

State Public Utilities Com. ex rel. The American Land and Gravel Co. et al., Appellees v. Ch. & N. W. Ry. Co. et al., 279 Ill. 110 (Af.).

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Chicago Motor Bus Co., Appellant v. Chicago Stage Co., 287 Ill. 320. Judgment reversed and order and decision of Utilities Commission set aside.

Chicago, Milwaukee & St. Paul Ry. Co., Appellant v. County of Lake et al., 287 Ill. 337. Judgment reversed and orders establishing a separation of grades and apportioning costs affirmed.

C. M. & St. P. Co., Appellant v. Franzen et al., 287 Ill. 346 (R. R.).

State Public Utilities Com. ex rel. Allis Brick Co. v. C. M. & St. P. Co., Appellee, 287 Ill. 412 (R. R.).

State Public Utilities Com. ex rel. Stein v. Ch. Tel.

Co. et al. (Stein, Appellant v. Chicago, City of Appellee), 287 Ill. 447 (R. R.).

State Public Utilities Com. ex rel. Board of Trade of Chicago, Appellee v. Cleveland, Cin., Ch. & St. Louis Ry. Co. et al., 288 Ill. 502 (R. R.).

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State Public Utilities Com. ex rel. Collinsville Pressed Brick Co., Appellee v. Pitts. Cin., Ch. & St. L. R. Co., 290 Ill. 580 (R. R.).

State Public Utilities Com. ex rel. Ill. Cent. R. Co., Appellee v. Thedens Highway Com., 291 Ill. 184 (R. R.).

State Public Utilities Com. ex rel. City of Springfield, Appellant v. Springfield Gas & Electric Co., 291 Ill. 209. Judgment modified and affirmed.

Chicago Railway Co. et al., Appellants v. Chicago, City of, 292 Ill. 190. Judgment of circuit court reversed. Order of commission affirmed.

Springfield Gas & El. Co., Appellant v. Springfield, City of, 292 Ill. 236. Decree of circuit court reversed. See section 39 amended. Ses. Laws 1919, p. 717.

Missouri Pacific Railroad Co., Appellant v. Public Utilities Commission, 292 Ill. 427. Order of commission reversed. Section 31 in its application to a foreign railroad corporation issuing bonds construed.

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## CHAPTER XXVI

### STATUTORY MODIFICATIONS OF COMMON LAW RULES

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Joint Obligations.

Joint Tenants.

Justices of the Peace—Civil Jurisdiction.

Judgments—Lien Upon Real Estate.

Limitation of Actions to Recover Real Estate—Statute of 1835.

Limitation of Actions to Recover Real Estate—Statute of 1839.

Master in Chancery—Right and Authority to Report Evidence.

Mortgagor's Right of Redemption from Mortgage Sale.

Notary Public.

Plats.

Rent—Demand for Payment by Landlord.

Rent—Assignee of Reversion—Right to Recover.

Trustees.

Verdict—Plaintiff Dies Before.

Women—Rights Under Statutes of 1861 and 1869.

Widow's Award.

COMMON LAW

AN ACT to revise the law in relation to the common law.

(Approved March 5, 1874. In force July 1, 1874.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly, That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James, the First, excepting the second section of the 6th chapter of 43 Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37 Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as full force until repealed by legislative authority. R. S. 1845, p. 337, Sec. 1 and Chap. 28, R. S. 1874.

The first settlers of Virginia brought with them the common law, as then in force in England. The laws of Illinois first adopted came from Virginia through Kentucky. The above statute was but a formal recognition that the common law, without specially defining its rules, was to hold sway over the inhabitants of the state, until modified by legislation.

What the rules of the common law were can now be best determined by considering some of the changes that the Legislature has made since 1818.

ACTION OF ACCOUNT

An action of account may be sustained:

First. By one joint tenant.

Second. By an executor or administrator with will annexed.

Third. By a residuary legatee.

Fourth. By and against executors and administrators.

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Fifth. By one or more co-partners against the other co-partner.

Sixth. On book account.

Chapter 2, section two R. S. 1874, page 100.<sup>1</sup>

### BOOKS OF ACCOUNT

“Where in any civil action, suit or proceeding, the claim of defense is founded on a book account, *any party* or *interested* person may testify to his account book and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non resident of the state at the time of the trial, and were made by such deceased or non resident person in the usual course of trade, and of his duty or employment to the party so testifying; and there upon, the said account books and entries shall be admitted in the cause.” Rev. Stat. 1874, p. 489, Sec. 3.

An attempt was made to have account books admitted in evidence by calling the bookkeeper, who had no personal knowledge of the sale or delivery of the goods, but who testified that the entries were in his hand writing and made in the usual course of business. In holding the books incompetent the court observes: “The statute does not seem to provide for the case where the entries have been made by a disinterested living and resident person, as here.”

Held also that the items were not admissible at common law because of a lack of satisfactory proof of the correctness of the items.<sup>2</sup>

1—Garrity v. Hamberger Co., 136 Ill. 499 (Af.).

2—Stettaner et al. v. White, 98 Ill. 72 (Af.).

RULES AS TO ADMITTING BOOKS OF ACCOUNT

BOOKS IN EVIDENCE

Plaintiff proved the delivery of stone and lime. Then produced in court an account book, and asked the following questions:

1st. Did plaintiff keep a clerk in 1835?

2nd. Is the book now in court plaintiff's book of account and are the entries in his hand writing?

3rd. Is his book fair and correct and have you settled with him on that book and found it correct?

4th. Was any part of stone and lime delivered?

Court says: (Preliminary proof.)

Delivery of some of the articles about time entries made.

2. Kept no clerk.

3. Book produced is book of account.

4. Entries are in his hand writing.

5. That they have been honestly and fairly made by testimony of those who have dealt with him and settled by that book.

Books excluded held error.

As to common law the court says:

"There are some great leading principles, some fundamental rules which are never departed from, being founded in the common reason of every man, and which no change of his condition can alter." "In regard to evidence, one of them is, that the best of which the nature of the case is susceptible, and in the power of the party to produce must in all case, be produced."

"In the case, then, of open accounts, composed of many items, where the items are made by the party himself, no clerk being employed, where some of the articles are proved to have been delivered to the party charged, and no admission made by him, and no receipt taken from him, what other evidence in the power of the party to

produce could be offered, than the books themselves, fortified by the testimony of disinterested persons, that they have settled their accounts by them, and that they are fairly and honestly kept.”<sup>3</sup>

**Humphreys v. Spear**, 15 Ill. 275 (Af.).

Hereby a clerk it was proven that the goods were sold by the plaintiff or the clerk (clerk testifying) that the entries were first put upon a slate and at evening they were transferred to a blotter; clerk said that he remembered selling the goods but could not remember the items; it was proved by several customers that they had settled by the books and found them correct.

Books admitted.

Further the court says:

“It is well settled in this country that entries made by a clerk, in the regular and usual course of business, are admissible in evidence after his death on proof of his hand writing; and during his life if authenticated by him.”

**McCormick v. Elston et al.**, 16 Ill. 204 (R. R.).

Here the ledger was admitted but not the day book on which the original entries were made. Held error.

**Dodson v. Sears**, 25 Ill. 513 (R. R.).

Held error to admit books because proper foundation had not been laid. The plaintiff kept clerks and it did not appear but that the sale might not have been shown by one or all of them.

Court says the rule adopted is: Prove that the entries are made by the party himself; that he kept no clerk; that he has no admission or receipt from the person charged that the goods have been received; prove that some of the articles have been delivered; that the books have been fairly kept.

3—**Boyer v. Sweet**, 3 Scam. 120.



**Ruggles v. Gatton, 50 Ill. 412 (R. R.).**

Books admitted. Held error. Because it does not appear that there was no clerk; nor does it appear that the books were the ones in which the entries were originally made, or that witnesses had settled by the books and found them correct.

**Taliaferro v. Ives, Adm., 51 Ill. 247 (R. R.).**

A defendant offered to show by his book how he had paid notes upon which he had been sued. Books excluded; but he was allowed to refresh his memory. Held error.

Court: "Without the statute of 1867, the defendant would be allowed to introduce his books."

**Kibbe v. Bancroft, 77 Ill. 18 (Af.).**

Book of plaintiff excluded, for the reason that it contained but one transaction. "An account book, to be used as evidence should be the book containing an entry of transactions in the store, factory or office, as they occur in the regular order of business. Statute of 1867 does not materially change existing rules of evidence, as to admission of books of account."

**House v. Beak et al., 141 Ill. 290 (Af.).**

Here it is held that "This statute permits the *party himself* to testify to his own books. The party was not allowed so to testify at common law." Further the court observes: "Section 3, which was first passed in 1867 (laws of 1867, sec. 3, page 184) adds to and enlarges but does not repeal, the common law rule. A contrary statement made in *Presbyterian Church v. Emerson*, 66 Ill. 269, was mere dictum and not necessary to the decision of the case."

## ALIMONY

The Statute of January 31st, 1827, declared, that when a divorce was granted, the court might make such order touching alimony the maintenance of the wife and the care of the children as, in the circumstances of the parties and the nature of the case, seemed fit.

Reavis v. Reavis, 1 Scam. 242 (R).

Foote v. Foote, 22 Ill. 425 (R. & A.).

Stillman v. Stillman, 99 Ill. 196, Appellate court reversed, Circuit court affirmed.

Here a motion was made by a defendant to reduce a decree of alimony on the ground that the wife had married again, and her present husband was living with her, Circuit court modified the decree. Appellate court held the modification *error*.

Court observes: "The question presented has not before arisen in this state, and the court is left free to determine it as one of first impression. \* \* \* The jurisdiction of the court to *grant the relief sought* is *expressly conferred by statute*, which provides, the court, in which any divorce is decreed, may make such order touching alimony and maintenance of the wife as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just, and may on application, from time to time, make such alteration in the allowance of alimony as shall appear to be just."

Lennahan v. O'Keefe et al., 107 Ill. 620 (Af.).

A man against whom a decree of divorce had been rendered and a decree of alimony entered, died leaving none but collateral kin who in a partition suit asked that the heirs might be discharged from further payment of alimony to the surviving wife. The court refers to chapter 40, section 18, R. S., and

says that the statute invests the court with power to declare the termination of all alimony, upon the occurrence of facts reasonably justifying such a declaration. The decree in the cause reserved the *right* to revise the amount of payment. *Held*: By the death of the defendant, the decree was no longer binding upon the heirs. Alimony has been modified "from what it was in case of divorce *a mensa et thoro* in England, by the Statute in this state."

Under our statute the question is: "Does the decree, by its terms, charge the payment of the alimony upon the heir? We can not presume that it does."

**Cole v. Cole, 142 Ill. 19 (Af.).**

A man, against whom a decree of divorce and alimony had been entered, applied for modification of the decree on the alleged ground that the wife had been, subsequent to the decree of divorce, guilty of adultery.

There was nothing in the record to show "the means or financial ability of the parties, or that any change had been had in their situation in life."

In justifying the decree the court says "that it (quoting from page 29) did not appear but that the alimony had been allowed by way of restitution of property to the wife." This case is decided upon a question of fact rather than a question of law.

Its value as a precedent is therefore lessened, if not entirely abrogated.

**Welty v. Welty, 195 Ill. 335 (Af.).**

Under section 18, a decree of alimony is subject to modification after the decree, and the termination of the term of the court at which the decree was entered.

This was a proceeding for contempt under the statute for non-payment of alimony.

A court of chancery can enforce the decree by contempt proceedings. A discharge in bankruptcy does not discharge a defendant who is under a decree to pay alimony.

*Shaffner v. Shaffner*, 212 Ill. 492 (Af.).

Here appellant was committed for contempt in not obeying an order entered against him for the payment of alimony. Held, that a demand previous to commencing the proceeding was not necessary. The case is decided on the facts. See, 241 Ill. 92.

#### ALIMONY PENDENTE LITE

See Revised Statutes, section 15, providing that the court pending suit can make order for alimony.

This, however, was a common law right.

*Petrie v. The People*, 40 Ill. 334 (Af.).

Contempt proceedings against Petrie.

#### ASSIGNMENT OF CROSS-ERRORS

Previous to the statute of 1869 (see revision of 1874, page 784, section 79) cross-errors could not be recognized upon the record. It is only by force of the statute that they are allowed.

*Smith v. Sackett*, 15 Ill. 528 (Af.).

This was a chancery cause, the defendant submitted a motion to assign cross-errors. On overruling the motion, the court says: "No precedent for allowance."

Harding v. Larkin et al., 41 Ill. 413 (R. R.).

In the above cause, defendant took the case up by appeal; plaintiff brought the cause up by writ of error; both were sustained. A writ of error is a writ of right. Our practice does not allow the practice of assigning cross-errors.

Page et al. v. The People ex rel., 99 Ill. 418 (R. R.).

Is a defendant in error or an appellee bound to assign cross-errors? The Supreme court, after referring to the statute thus, observe: "This, it will be perceived, is permissive only. It confers upon the appellee or defendant in error a discretion to assign cross-errors, but does not make it imperative that they should do so, nor bar them of the right to prosecute a cross-appeal or writ of error, if they shall elect not to assign cross-errors. If they do assign cross-errors, they can not afterwards prosecute a writ of error upon the same record; but when they do not do so, they retain their common law right to sue out a writ of error upon the same record." Citing as an authority a Kentucky case, Wickliffe v. Buckman, 12 B. Mon. 424.

In this case a plea was filed by the defendant in error setting up that he had previously taken up the same record to the Supreme court and the plaintiff (now plaintiff in error) in error had joined in error but had not assigned any cross-errors and claiming by the plea that the plaintiff was therefore estopped from further assigning error. In overruling the plea the court made the observations above quoted.

#### ATTORNEY SUSPENDED FROM PRACTICE

*Nisi prius* courts have no power to suspend from practice an attorney, at common law.

Statute: "Any judge of a circuit court or of the Superior court of Cook county shall, for like cause, have power to suspend any attorney or counselor at law from practice in the court over which he presides, during such time as he may deem proper, subject to have the order set aside by the Supreme court on appeal." Sec. 6, Chap. 13, R. S. 1874.

Winkleman v. The People, 50 Ill. 449 (R.).

The People v. Kavanaugh (Mandamus v. a Judge), 220 Ill. 49. Writ awarded.

### BASTARDY

"AN ACT to provide for the maintenance of illegitimate children," approved Jan. 23, 1827.

Wright v. Bennett et al., 2 Gil. 587 (Af.).

Reputed father sued upon his bond. The defendant pleaded in bar: that he had demanded the child of the mother and she had refused to surrender it. On demurrer the court sustained the plea. Held under the statute the father was bound only to execute one bond, and that on refusal of the mother to give to him the custody of the child, he was relieved of liability for its support, the court observing:

"By the common law, the reputed father was not entitled to the custody of his illegitimate children. By the provisions of our statute, under the circumstances of this case, he is."

### BASTARDY—CIVIL, NOT CRIMINAL

"It is well settled by the decisions of this court that a proceeding under the Bastardy Act is a civil and not a criminal proceeding; that though in form criminal, it is

essentially of the nature of a civil action, the object being, not the imposition of a penalty for an immoral act, but merely to compel the putative father to contribute to the support of his illegitimate child."

Mann v. The People, 35 Ill. 467 (Af.).

Pease v. Hubbard, 37 Ill. 257 (R.).

Maloney v. The People, 38 Ill. 62 (Af.).

The People v. Noxon, 40 Ill. 30 (motion denied).

Allison v. The People, 45 Ill. 37 (Af.).

The People v. Starr, 50 Ill. 52 (Af.).

McCoy v. The People, 71 Ill. 116 (R. R.).

Kolbe v. The People, 85 Ill. 336 (Af.).

Mings v. The People, 111 Ill. 98 (Af.).

Rawlings v. The People, 102 Ill. 475 (R. R.).

Scharf v. The People, 134 Ill. 240 Dis.

Here the case of Rawlings v. The People is overruled so far as it holds that the amount required to be paid by the putative father, is a penalty, and for this reason an appeal does not lie to the Supreme court, where the amount involved is less than \$1,000.

### BURNT RECORD ACT

Proceedings under the "Burnt Record Act" are purely statutory and must be strictly complied with.

The statute says that the practice is chancery.

AN Act to remedy the evils consequent upon the destruction of any public records by fire or otherwise and in force April 9, 1872.

Revised Statutes of 1874, page 838.

Kerr et al. v. Hitt, 75 Ill. 51 (R. R.).

Hitt filed a petition under the act. Ordered dismissed and relief under cross-bill ordered.

Strong et al. v. Shea et al., 83 Ill. 575 (Af.).  
Petition not granted.

Mulvey v. Gibbons et al., 87 Ill. 367 (R. R.).  
Reversed in favor of the petitioner.

Smith et al. v. Hutchinson et al., 108 Ill. 662 (R. R.).

Heacock v. Hosmer, 109 Ill. 245 (Af.).  
Act constitutional. No jury trial on facts in petition.

Gage et al. v. Caraher, 125 Ill. 447 (Af.).  
The act of 1845, R. S., Ch. 89, Sec. 73, does not make the tax deed *prima facie* evidence of a valid judgment, or affidavit of notice.

Gage v. DuPuy, 127 Ill. 216 (R.).  
Supreme court ordered the petition to be dismissed.

Gage v. DuPuy, 134 Ill. 132 (Af.).  
Petition dismissed in favor of one of the defendants by the order of the Supreme court and retained against other defendants who made no defense.

Harding v. Fuller et al., 141 Ill. 308 (Af.).  
Act constitutional.

Harms v. Jacobs, 155 Ill. 221.  
Writ of Error dismissed. Petition filed by defendant in error.

Miller et al. v. Stalker, 158 Ill. 514 (Af.).  
Petition granted. Reliance upon limitation statute of 1839. See holding.



Gage v. Thompson, 161 Ill. 403 (A. & Modified).

Tax deed unsupported by a judgment and precept is not sufficient to show title.

Llewellyn v. Dingee, Admx., 165 Ill. 26 (Af.).

Averments in the petition, that are neither admitted nor denied must be proved, for the reason that the chancery practice governs.

Loewenthal v. Elkins, 175 Ill. 553 (R. R.).

Jurisdictional question and payment of taxes. See opinion.

Glos v. Mulcahy, 210 (R. in part).

Tax deed involved. See opinion.

Bennett v. Roys, 212 Ill. 232 (Af.).

See opinion as to adhering to the chancery practice.

#### CITIES—CONTROL OVER ITS STREETS

City of Alton v. Transportation Co., 12 Ill. 60 (R. R.).

Is the leading case on the proposition that a municipality holds its streets in trust for the benefit of the public and can not alien the same.

Quincy, City of, v. Jones et al., 76 Ill. 231 (R. R.).

City was sued for diminishing the lateral support of the plaintiffs' lots, in consequence of the city making a deep cut in the earth adjoining. The court in reversing in favor of the city use this language: "Defendants in error can claim no right to the lateral support of the soil in the street by prescription, because it is impossible that they could have obtained such right by grant."

Kreigh et al. v. Chicago, City of, 86 Ill. 407 (Af.).

This was an appeal from a confirmation proceeding special assessing property. The point was made that the city had no authority to interfere with the street: "having previously invested the West Chicago Park Com. with exclusive control thereover."

Court: "It is never to be presumed that the Legislature, having invested them with this power, has, at the same time, authorized them to surrender it to others over whose acts they can exercise no control."

#### CITIES—CHANGING THE GRADE OF STREETS

"At common law, where an act not *malum in se* is authorized to be done, and it is performed with due care and skill, in strict conformity with the provisions of the act it can not be made the ground of an action, however much one may be injured by it." Quoted from *Rigey v. Chicago, City of*, 102 Ill. 64 (R. R.).

The constitution says that Private property shall not be taken or damaged for public use. Any "expressions in former opinions which may seem to restrict the remedy of owner of Private property, as given by the present Constitution to cases where there has been a direct physical injury to the property, are not to be accepted as embodying the views of the court."

It is claimed by Scott, J., dissenting, that the rule in the *Moses Case*, 21 Ill. 516, is departed from in the above case.

*Chicago, City of, v. Union Building Ass'n*, 102 Ill. 379.  
*C. W. I. R. R. Co. v. Ayres*, 106 Ill. 511 (Af.).

*Bloomington, City of, v. Pollock*, 141 Ill. 346 (Af.).

House built in 1858; ordinance fixing grade adopted in 1860; Pollock purchased house and lot in 1878; improvement made in 1889. Action—Case for raising level of street.

Joliet, City of, v. Blower, 155 Ill. 614 (R. R.).

Changing grade of Exchange street. Reversed on point of the admissibility of the evidence.

**CITIES—LIABILITY TO PAY INTEREST**

A Municipal corporation is not liable for interest unless made so by special contract or by statute. Money wrongfully paid can be recovered back.

Madison County v. Bartlett, 1 Scam. 67 (R. R.).

Chicago, City of, v. N. W. Mutual Ins. Co., 218 Ill. 40 (Af.).

Pekin v. Reynolds, City of, 31 Ill. 529 (R. R.).

Chicago, City of, v. The People ex rel., 56 Ill. 327 (R. R.).

Dunlevy v. South Park Commissioners, 91 Ill. 49 (R. R.).

Hall v. Jackson, County of, 95 Ill. 352.

Vider v. Chicago, City of, 164 Ill. 354 (Af.).

Danville, City of, v. Danville Water Co., 180 Ill. 235 (R. R.).

**FEE IN MUNICIPALITY—MANNER OF VESTING**

In order to put the fee of a street in the municipality the grantor must make, certify, acknowledge and record the plat. Revised Statutes 1845, Sec. 21, Chap. 25. On this point

Canal Trustees v. Havens et al., 11 Ill. 554 (R. R.).

Facts: Appeal taken by the trustees from an order of the Circuit Court approving an assessment in favor of appellees diverting the water of the Des Plaines river from their mill and applying it to the uses of the canal. Assessment made in pursuance of an agreed case.

Court says: "Under the provisions of this statute, the legal title to the land embraced by a

street is vested in the corporation of the town or city, for the use and benefit of the public. It is not in the power of the grantor proprietor of the lots to transfer the fee in the street to his grantee. The acknowledgment and recording of the plat has all the force and effect of an express grant. \* \* \*

If the plat is recorded before the town has a corporate existence, the fee remains in abeyance, subject to vest in the corporation the moment it is created. A purchaser only acquires a title to the land included within the actual limits of the lot, as designated on the plat."

*Indianapolis, Bloomington & Western R. Co. v. Hartley et al.*, 67 Ill. 439 (Af.).

Facts: Trespass for breaking and entering close. Land where trespass was committed was never platted but was within corporate limits. Prior to the extension of the city limits a public highway, known as Peoria Road, had been established on the south side of the premise, 60 feet wide, one-half of the land being owned by the appellees. After the limits of the city had been extended so as to include this tract fifteen years ago, the highway over which the public had exercised jurisdiction for so many years was called "Front street," being a continuation, by common consent, or a street of that name to the western boundary of the city and by dedication or common user it was made 14 feet wider than the old road.

The city neither purchased nor condemned the additional number of feet added to the street. There was no ordinance formerly extending westward, but the city assumed and continued to exercise jurisdiction over the highway as a street the same as other streets in the city.

Under authority of ordinance appellant con-

structed its road diagonally across Front street south of appellees' premise, without their consent; excavated the street 4 or 5 feet; the track nowhere touches the land of appellees but comes within 6 inches or a foot of it at one corner, and if they own to the center of the old highway, then it is constructed on land the fee of which is in them.

Excavation in the street made it necessary to lower the grade in front of the premise of appellee and in so doing the company removed large amount of earth. This latter work was done under the direction of the street commissioner, so as to have an even grade on which the public travel could more conveniently pass over the track.

Court: "The principal question in the case is, whether the state and the municipal authorities combined have the power to grant the company the right to construct its track across lands the fee of which is in appellees, without obtaining their consent or making compensation.

"The (quoting from page 443) exact question presented has not been passed upon by this court."

After referring to *Moses et al. v. Pittsburg, Ft. Wayne & Chicago R. R.*, 21 Ill. 516, and *Murphy v. Chicago*, 29 Ill. 279, the court says:

"The doctrine (quoting from page 445) most in consonance with our sense of justice is, where the fee of the street remains in the abutting land owner the corporation may grant the right to a railroad company to lay its track along or across any street, but the company avails of its privilege at its peril. If, in laying its track, it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained."

Foreign authorities cited support the conclusion of the court as said by the writer of the opinion.

St. John v. Quitzow, 72 Ill. 334 (R. R.).

When a street is vacated, the fee of which is in the municipality, the fee will return to the original proprietor. Examine opinion.

#### CITIES—EJECTMENT

Gebhardt v. Reeves, 75 Ill. 301 (Af.).

Abner Reeves owned the lots formerly, platted the same and now seeks to recover what was streets and alleys. In this case the original plat had been destroyed by fire and the court says that the preponderance of the evidence is, that there was a statutory dedication. Then the court says following

St. John v. Quitzow:

“Under our statute, by the making, acknowledging and recording of the plat of the town, the owner of the land voluntarily parts with all his title to the streets and alleys and transfers it to the corporation. The legal effect is precisely the same as if he had made a direct conveyance to the corporation, in trust for the public.”

In this case the defendant was one of the property owners that petitioned the city council to vacate the street. And it was held that he was “estopped from asserting that an easement remains in the city for his benefit.”

Brooklyn, Village of v. Smith, 104 Ill. 429 (R. R.).

Facts: As against lot owners who have acquired rights of egress and ingress to their lots the city in whom is the fee of streets and alleys, can not vacate the same.

Court says: “If the town has not been incorporated the fee remains in abeyance, subject to vest in the corporation the moment it is created.” Citing Havens and Gebhardt.

SUITS AGAINST MUNICIPAL CORPORATIONS

County. "An Act to incorporate Counties." January 3, 1827.

Common Law: Not liable to be sued.

Facts: Georges Hedges, within the bounds of Greenfield road district (county bound to keep in repair bridges) was riding a horse moderately and by reason of the plank upon the bridge being without support, and put on loosely, the horse fell through and was killed. A demurrer was sustained to this declaration. *Hedges v. Madison, County of*, 1 Gil. 567 (Af.).

Court: "By 'An Act to incorporate counties,' approved January 3, 1827, counties are constituted a body corporate and politic \* \* \* power to sue and be sued. There is, however, no provision of law giving an action to recover damages in a case like the present. \* \* \* The duties to be performed by a county are for the benefit of the public, and it becomes the duty of the public to enforce their performance, and to prescribe a punishment or penalty for a neglect or failure to perform them. This the law has done \* \* \* by providing a mode to punish the agents for failure to perform their public duties. Such has been the purport of the decision in the case of *Russell et al. v. The Men Dwelling in the county of Devon*. 2 Durnford & East, 311.

In the above case Lord Kenyon said: "The question here is, whether this body of men who are sued in the present action, are a corporation, or quasi corporation against whom such an action can be maintained. If it be reasonable that they should be by law liable to such action, recourse must be had to the Legislature."

Citing: *Riddle v. Proprietors, etc.*, 7 Mass. 186.

Bartlett v. Crozier, 17 Johns 446.

Schuyler, County, v. Mercer, County of, 4 Gil. 20.

Independent of statute counties have no right to sue or be sued.

Hollenbeck, Admx., v. Winnebago, County of, 95 Ill. 148 (Af.).

Cases reviewed and original holding adhered to.

Elmore v. Drainage Comrs., 135 Ill. 269 (Af.).

Court says: "In regard to public involuntary quasi corporations the rule is otherwise, and there is no such implied liability imposed upon them," as there is upon municipal corporations such as villages, towns and cities. The latter are liable to respond in damages for the negligence or torts of their officers.

#### CONSTRUCTIVE SERVICE IN CHANCERY

Setting aside decree in chancery within three years. Section 19, chap. 22, R. S. 1874.

Where a defendant has been brought into court only by constructive service, and has received no notice of the decree against him, as authorized by statute, such decree is, for the period of three years simply provisional, subject to be set aside on sufficient cause shown within the time.

Lyon et al. v. Robbins, 46 Ill. 276 (R. R.).

Southern Bank, St. Louis v. Humphreys et al., 47 Ill. 227 (Af.).

Martin v. Gilmore et al., 72 Ill. 193 (R. R.).

Lawrence v. Lawrence, 73 Ill. 577 (Af.). This statute applies to divorce decrees.

Trustees of the M. E. Church v. Field et al., 135 Ill. 112 (R.).



SERVICE OF PROCESS IN CHANCERY

Before a default can be entered and a decree entered *pro confesso*, the statutory requirement as to service must have been strictly and to the letter complied with. See sections 8-9-10 and 12, chap. 22, R. S. 1874.

Townsend et al. v. Griggs, 2 Scam. 365 (R. R.).

Montgomery et al. v. Brown et al., 2 Gil. 581 (R. R.).

Here it is said that the sheriff's return must state the name of the person, in addition to his statement that he left the copy with a member of the family. "Where this is done, a clue is furnished the defendants, which enables them to follow up the officer's conduct, and ascertain at once the truth of the return."

Jacobus v. Smith, 14 Ill. 359 (R. R.).

Here there was service on one defendant by summons and on the other by publication; as to latter court says: "A decree by default cannot be entered against a party before there has been a return of the process issued against him. \* \* \* It does not follow because he resides out of the state when the suit is commenced, that he can not be served with process. He may come within the jurisdiction before the return day of the writ. It can not be known until a return of *non est inventus* is made that personal service can not be had upon him." (Since this decision the statute has been changed which see. Question is it necessary under the present statute?)

Cost et al. v. Rose et al., 17 Ill. 276 (R. R.).

Boyland v. Boyland, 18 Ill. 551 (R. R.).

Miller v. Mills, 29 Ill. 431 (R. R.).

Tompkins et al. v. Wiltberger, 56 Ill. 385 (R. R.).

Piggott et ux. v. Snell, 59 Ill. 106 (R. R.).

Here defect was "usual place of abode omitted."  
 Greenwood v. Murphy, 131 Ill. 604 (R. R.).

#### CERTIFICATE OF ACKNOWLEDGMENT

Statute of 1819, section 11, Act of 1827, Revised Statutes of 1833, page 132, sections 16 and 20, chap. 24, Revised Statutes 1845, sections 19, 20 and 21, chap. 30, R. S. 1874. See Amendment to Conveyance Act with reference to Acknowledgments, Session laws, 1853, page 89.

The certificate of acknowledgment must show affirmatively all the statutory requirements, as "personal appearance," "personal knowledge of," or "identification by a person named in the certificate."

Shephard v. Carriel, 19 Ill. 313 (R. R.).

Adams v. Bishop, 19 Ill. 395 (Af.).

Montag v. Linn, 19 Ill. 399 (Af.).

Tully v. Davis, 30 Ill. 103 (Af.).

Fell v. Young, 63 Ill. 106 (R. R.).

Gage v. Wheeler, 129 Ill. 197 (Af.).

Lindley v. Smith, 46 Ill. 523 (Af.).

See as to Acknowledgment of Plats, 188 Ill. 474, 204 Ill. 488.

Spaulding v. M. W. I. R. C., 225 Ill. 585 (R. R.).

Vermont, Village of v. Miller, 161 Ill. 210 (Af.).

"At common law, a feme covert could only acknowledge that she transferred her real estate or relinquish her dower by a fine or recovery, and it was, and could only be by matter of record. The acknowledgments prescribed by statute are intended to take the place of such alienations by record." ' Quotation from Lindley v. Smith, page 528.

#### ACKNOWLEDGMENTS OF DEEDS

The statute (11 section act, of Jan. 31st, 1827) says:

"No judge or other officer shall take the acknowledg-

ment of any person, to any deed or instrument of writing as aforesaid, unless the person offering to make such acknowledgment shall be personally known." See section 24, chap. 30, R. S. 1874.

The elements in an acknowledgment are personal acquaintance, personal appearance, the fact of acknowledgment. These are statutory requirements, and must be enforced. See 28 Ill. 219.

McConnel v. Reed, 2 Scam. 334 (R. R.).

Court says: "The evident object of the legislature, in these directions in relation to the acknowledgment of deeds, is to prevent one individual from personating another."

Ayres v. McConnell et al., 2 Scam. 307 (R.).

Ejectment; deed offered and rejected because no cer. of Per. K.

Wiley et al. v. Bean et al., 1 Gil. 302 (R. R.).

See chap. 30, section 24, Conveyances.

Short et al. v. Conlee, 28 Ill. 219 (Af.).

Ejectment; a deed was objected to because not proven; the certificate was personally appeared; personally known to be the identical persons who executed, and whose names are subscribed to the foregoing deed of conveyance as having executed the same and whose names are subscribed to the foregoing deed of conveyance, as having executed the same to be their voluntary act and deed."

Court, in holding this certificate defective says: "One fact must prominently appear in the certificate that the party executing the deed did in fact acknowledge it to the officer to be his deed." The word "acknowledge" must be used or a word equivalent.

Act of 1853 Scates Comp. referred to.

Lockwood v. Wells et al., 39 Ill. 602 (Af.).

Shephard v. Carriel, 19 Ill. 313 (R. R.).

Ejectment; deed offered and rejected because for knowledge there was substituted "I am satisfied."

Adams v. Bishop, 19 Ill. 395 (Af.).

Ejectment; deed offered that was acknowledged in 1827; rejected because "one of the statute's most essential requirements (personal knowledge of the grantor or his identity proved by witnesses) was omitted. Case tried in 1857.

Montag v. Linn, 19 Ill. 399 (Af.).

Ejectment; deed offered and rejected because certificate did not contain statement that the grantor was known or that his identity had been made known by the testimony of a credible witness.

Owen v. Robbins, 19 Ill. 545 (Af.).

Petition for dower; certificate of acknowledgment defective because it did not state that wife was "made acquainted and 'acknowledged'."

Tully v. Davis, 30 Ill. 103 (Af.).

Ejectment; deed offered; certificate did not contain any word after personal but instead there was a blank. Held that the court could not indulge in any presumption that the grantor was known; no word could be supplied.

Fell v. Young, 63 Ill. 106 (R. R.).

Ejectment; deed offered by plaintiff; personal knowledge omitted from the certificate: deed admitted held error.

Lindley v. Smith, 46 Ill. 523 (Af.).

Certificate of knowledge is one of substance.

Osgood v. Blackmore, 59 Ill. 261 (Af.).

Acknowledgment is no part of deed, "unless it is intended to convey a married woman's real estate."

Merritt v. Yates, 71 Ill. 636 (R. R.).

Deed improperly admitted "because cer. did not state whose "wife was made acquainted."

Gage v. Wheeler, 129 Ill. 197 (Af.).

Cites 30-103, 63-106 and 19-313.

Fisk v. Hopping, 169 Ill. 105 (Af.).

Ejectment; deed acknowledged in 1850 before a commissioner residing outside the state. See Laws of 1845, p. 580, or Laws of 1847, pp. 32, 37.

Lewis v. McGrath, 191 Ill. 401 (Af.).

Examine this case as to what will be sufficient to overcome a notary certificate.

*Cases that involve a freehold go direct to the Supreme Court, under the statute of 1877, p. 69.*

Where the validity of a will is in contest that makes a different disposition of the real estate than the statute would, a freehold is involved.

Brace et al. v. Black, 125 Ill. 33 (Af.).

Where the residuary clause in a will would pass real estate a freehold is involved and the appeal goes direct to the Supreme Court.

Senn et al. v. Gruendling, 218 Ill. 458 (Af.).

Newberry v. Blatchford, 106 Ill. 584.

This case involved the construction of a will: Question, quoting from page 41, vol. 99, is "whether, under a proper construction of the will, there can be now, during the life time of the widow of the tes-

tator, a legal division of the estate by the trustees."

Quoting from page 588, 106 Ill.: "A majority of the court are of the opinion a freehold is involved in the case, and therefore an appeal lies directly from the circuit court to this court. In that conclusion the writer does not concur being of the opinion the case is one involving only the construction of a will, and that no freehold is involved."

*Cheney et al. v. Teese*, 108 Ill. 473 (R. R.).

The point to be determined by the construction was: the right to the (quoting from page 476) use and enjoyment of lands for and "during the life of Mrs. Tees."

No question was raised as to the right of the Supreme Court to entertain the appeal.

*DeHaven v. Sherman et al.*, 131 Ill. 115 (Dis.).

*Young et al. v. Harkleroad*, 166 Ill. 318 (R. R.).

#### CONSTRUCTION OF A WILL

*Hoeffer v. Clogan*, 171 Ill. 462 (R. R.).

The 4th and 5th clause of a will devised certain lands to the Holy Catholic Church the proceeds of the land to be used in saying masses for the repose of certain souls. The circuit court held the two clauses that devised land void. On appeal Patrick Clogan made a motion to dismiss. In overruling the motion the court says:

"The purpose of the bill was to settle the question whether the fee simple title to the lot described in the 4th clause passed, or whether the devise was void. The circuit court held it void. A freehold is involved in the appeal from that decree."

For a case that involved the construction of a will that went through the Appellate Court to the Su-

preme Court, see *Bennett v. Bennett et al.*, 217 Ill. 434 (Af.).

*Parsons v. Millar*, 189 Ill. 107 (R. R.).

Bill to construe a will in which there were devises of real estate. The decree, among other things found, that Sarah M. Parsons took no interest in the estate; that the lands devised to William E. Millar vested in him absolutely Sarah M. Parsons sues out of the Supreme Court a Writ of Error. William makes a motion to dismiss because there is no freehold involved.

Court says: Seventh assignment of error is: "The court erred in decreeing that William E. Millar take and have the lands devised to him by the will free from the interest of any other person, and in not decreeing, etc.

The court after stating the facts and citing *Sanford v. Kane*, 127 Ill. 591 says: Under the doctrine announced in that case and subsequent cases there can be no question but that a freehold is involved.

*Crawford v. Cemetery Ass.*, 218 Ill. 399 (R. R.).

Bill to construe a will went direct to Supreme Court but there was an assignment as error that the court erred in holding that the real estate descended to heirs at law.

*Hill v. Gianelli*, 221 Ill. 286 (Af.).

*Vanatta v. Carr et al.*, 223 Ill. 160 (R. R.).

In this case the court was asked to decree a title out of the widow of testator.

Cases that involved a freehold go direct to Supreme Court.

*Bills in Chancery to remove a cloud do not go direct to Supreme Court.*

Gage v. Busse et al., 94 Ill. 590 (Ap. Dis.).

Bill in chancery to set aside certain certificates of sale of land for taxes. Majority of court say no freehold involved.

Hutchinson v. Howe, 100 Ill. 11 (Ap. Dis.).

Appeal from trial court. Syllabus: When the litigation concerns an executory or conditional contract which is alleged to create a cloud, a freehold is not necessarily involved. If the cloud is a mere incumbrance, a freehold is not involved.

*Bills in chancery to remove clouds, that do go direct to the Supreme Court.*

Bridges et al. v. Rice, 99 Ill. 414 (Af.).

This was a bill to remove a cloud from real estate title. It was sought to have set aside a decree, and deed executed under the decree.

Bank Ass. v. Com. Nat., 157 Ill. 576 (Af.).

Court says: "Where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, and also in cases where the title to the freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining and the other losing the estate we have held a freehold involved. Citing Sanford case, 133 Ill. 291, and Watson Case, 105 Ill. 217.

*Cases that involve a freehold go direct to the Supreme Court.*

Monroe v. Van Meter et al., 100 Ill. 347 (Af.).

Here there was an attachment that had been levied upon land.

Court says: "It will be (quoting from page 351)



observed, that under the pleadings the issue made and determined by the evidence was one of title to the land levied on by the writ of attachment.

\* \* \*

A freehold is involved in an action where the title to the land is presented and in issue between the parties.

Kerfoot v. Cronin, 105 Ill. 609 (Af.).

Motion to dismiss the appeal. Court: "A majority of the court (quoting from page 613) are of opinion that a freehold is involved. To authorize a decree for the complainant, title must be established in Hansbrough, or it must be shown that the defendants are estopped, in other words, legally compelled to admit title in him. It is put in issue by the answer—whether Hansbrough has such title.

Piper v. Connelly, 108 Ill. 646 (Af.).

Trespass to land. Defendants found guilty. On motion to dismiss Court says: "Motion overruled. The plea of *liberum tenementum* necessarily, where, as here it is directly put in issue by the replication, involves a freehold."

Frank et al. v. King et al., 121 Ill. 250 (R. R.).

Motion to dismiss. In overruling the same Court says: "The same question arose in *Monroe v. Van Meter*, 100 Ill. 347, and we held that a freehold was involved." It was an action of attachment levied upon land.

Schwartz v. Ritter, 186 Ill. 209 (R. R.).

Partition. If the subject of the partition is a freehold estate, a freehold is involved, and that is the case in this instance.

Carter v. Penn, 99 Ill. 390 (R. R.).

**Bangs v. Brown**, 110 Ill. 96 (Af.).

**Ames et al. v. Ames et al.**, 148 Ill. 321 (R. R.).

**Gould v. Theological Seminary**, 189 Ill. 282 (Af.).

Here the court says: "The testator (it was an appeal from a decree of the circuit court directing that a will should be admitted to probate) died seized and possessed of real estate situated in the state of Illinois, which is disposed of by the will. A freehold, therefore is involved, and the appeal was properly prosecuted to this court."

**More v. More**, 191 Ill. 97 (R. R.).

The circuit court on appeal denied probate of a will. On appeal to the appellate court the order was reversed. Held that the appellate court erred for the reason that it did not dismiss the appeal, as the will by its terms disposed of real estate, and the appeal should have been taken direct to the Supreme Court.

**Perry v. Bozarth**, 198 Ill. 328 (R. R.).

Certiorari. Quashing proceeding vacating a highway. Held that the interest that the commissioners of highways obtained in an established public highway was a perpetual easement, and that amounts to a freehold. Hence the appellate court no jurisdiction to entertain the appeal.

**Harlem, Village of v. Suburban R. R. Co.**, 198 Ill. 337 (Af.).

A freehold is involved in a suit by a railroad company to perpetually enjoin a village from interfering with its right under ordinance to maintain a railway track.

*Cases that involve a freehold go direct to Supreme Court.*

Sanford et al. v. Kane, 127 Ill. 591 (R. R.).

The plaintiff in error sued out of the Supreme Court a writ of error to reverse a decree of the appellate court.

It was a bill to redeem. In reversing the appellate court for want of jurisdiction to pass upon the record, the Supreme Court says: "By the pleadings (quoting from page 594) both parties claim an estate in the land in fee. Sanford claims such an estate under a power in a mortgage, and a deed from the person holding and, as he alleges, entitled to execute that power, purporting to convey to him an absolute estate in fee. The complainant denies Sanford's title. \* \* \* The title to the land was thus put directly in issue, and evidence was introduced at the hearing by both parties applicable to the issue thus formed.

"A freehold being involved in the present case, the appellate court should not have assumed jurisdiction."

A perpetual easement in public grounds and streets claimed by a municipality by virtue of an alleged dedication involves a freehold.

Stevenson, Appellee v. Lewis, 244 Ill. 147 (R. R.).

#### FREEHOLDS NOT INVOLVED

Where a freehold is involved in the original decree, but not in the points assigned, the appeal should be to the appellate court.

Cheney v. Teese, 113 Ill. 444 (Dis.).

Here the court says that when the case was first presented (108 Ill. 473) a freehold was involved, "the only question here involved, is what amount the complainants are entitled to recover from the receiver. Such being the case, it is plain under the statute an appeal did not lie.

Walker v. Pritchard et al., 121 Ill. 221 (Af.).

Malaer et al. v. Hudgens, 130 Ill. 225 (Writ of error Dis.).

This case refers also to the Watson case and the Kane case, 105-215 and 127 Ill. 591.

Moore v. Williams, 132 Ill. 591 (Ap. Dis.).

Franklin v. L. I. C. N. A. et al., 152 Ill. 345 (Ap. Dis.).

Rhodes et al. v. Id., 172 Ill. 187 (Ap. Dis.).

Fread v. Id., 165 Ill. 229 (Af.).

Fields v. Coker et al., 161 Ill. 186 (Ap. Dis.).

In Re Estate of Ross, 220 Ill. 142 (Ap. Dis.).

Miller v. Kensil, 223 Ill. 201 (Ap. Dis.).

Hutchinson v. Spoeher, 221 Ill. 312 (Ap. Dis.).

Rule: "A freehold is involved, within the sense and contemplation of the constitution and the statute, only in cases where either the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, or where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." Quoted from 136 Ill., p. 19.

Goodkind v. Bartlett, 136 Ill. 18. Appeal dismissed.

In the following cases the appeal was dismissed.

People ex rel. v. West Chi. St. R. Co., 203 Ill. 551 (R. R.).

Sanford et al. v. Kane, 127 Ill. 591 (R. R.).

Appeal from writ of error to the appellate court ordered that appellate court dismiss the appeal. This case states the rule given above.

Rhoten v. Baker et al., 193 Ill. 271 (Dis.).

Cites rule above. Bill to compel parties to assess benefits for the opening of a road.

Kuhn v. Eppstein, 231 Ill. 314.

Cause transferred.

Cases that do not involve a freehold can not go direct to the Supreme Court.

“A (quotation from page 229) freehold is involved, within the sense and contemplation of the constitution and the statute, only in case where either the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, or where the title is so put in issue by the pleadings that the decision in the case necessarily involves a decision of such issue.”

*Malaer et al. v. Hudgens*, 130 Ill. 225 (Ap. Dis.).

*Prouty v. Moss*, 188 Ill. 84 (Ap. Dis.).

Where it is sought to have a deed declared a mortgage no freehold involved, 218-340 (Ap. Dis.).

Where a freehold is only incidentally involved appeal is properly to appellate court. *Pitts v. Looby*, 142-534.

*Miscellaneous cases* where court held no freehold involved.

*La Fleure v. Seivert et al.*, 188 Ill. 525 (Ap. Dis.).

Bill to set aside judgment by confession and enjoin sheriff from selling.

*Richie et al. v. Cox*, 188 Ill. 276 (Ap. Dis.).

Petition in county court to sell lands to pay debts held not within Lynn case, 160 Ill. 307.

*Brownmark v. Livingston*, 190 Ill. 412 (Ap. Dis.).

Injunction against tearing down a wall.

*Kronenberger et al. v. Heinemann*, 190 Ill. 17 (Writ Dis.).

*Kerr v. Brawley*, 193 Ill. 205 (Ap. Dis.).

Application for writ of assistance.

*Rhoten v. Baker*, 193 Ill. 271 (Ap. Dis.).

Appeal from an order dismissing a bill to compel parties assessed for benefits to pay the same.

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Seidschlag v. Antioch, Town of, 198 Ill. 413 (Ap. Dis.).

Appeal from justice of the peace for obstructing a highway.

Kesner v. Miesch, 204 Ill. 320 (Af.).

Proceeding to cancel a contract as a cloud. Court: "The title to the freehold (quoting from page 322) is not put in issue in any manner by the pleadings, and there is no assignment of error touching the freehold. \* \* \* No question concerning the freehold was contested or adjudicated and none is involved in the appeal.

*Records* involving a *Creditor's Bill* to set aside conveyances do not involve a freehold. Or enforce a *mechanic lien*.

Clement v. Reitz et al., 103 Ill. 315 (Dis.).

Conkey et al. v. Knight et al., 104 Ill. 337 (Ap. Dis.).

Sawyer et al. v. Moyer et al., 105 Ill. 192 (Dis.).

C. B. & Q. R. R. v. Watson et al., 105 Ill. 217 (Dis.).

Richards v. People, 100 Ill. 423 (Ap. Dis.).

Bill to enjoin obstruction to highway.

Illinois Furnace Co. v. Vinnedge et al., 106 Ill. 650 (Dis.).

Bryan v. East St. Louis, 105 Ill. 144.

Bill to set aside tax deed.

Galbraith v. Plasters, 101 Ill. 444.

Bill to set aside sale of land on execution.

Johns v. Boyd, 117 Ill. 339 (Dis.).

Blackman et al. v. Preston Bros. et al., 119 Ill. 240 (Dis.).

Adkins v. Beane, 135 Ill. 530 (Dis.).

Hupp et al. v. Hupp et al., 153 Ill. 490 (Ap. Dis.).

A deed set aside no freehold involved.

Fairbanks v. Carle, 217 Ill. 136 (Ap. Dis.).

Moshier v. Reynolds et al., 155 Ill. 72 (Ap. Dis.).

Pringle v. James, 185 Ill. 274 (Dis.).

First Nat. v. Vest et al., 187 Ill. 389 (Ap. Dis.).

Bill to set aside fraudulent conveyance.

Dolton v. Dolton, 196 Ill. 154 (Af.).

A man was fined before a justice of the peace for obstructing a highway. Bill filed by him to enjoin commissioners from collecting the fine. The decree appealed from found that commissioner was owner in fee simple. Held freehold involved.

Biggins v. Lambert, 204 Ill. 142 (Dis.).

Fairbanks et al. v. Carle et al., 217 Ill. 136 (Dis.).

Pearson Lumber Co. v. Brady, 159 Ill. 378 (Dis.).

Mechanic lien.

A BILL TO FORECLOSE A MORTGAGE DOES NOT INVOLVE A  
FREEHOLD

Grand Tower Mining Mfg. Co. v. Hall, 94 Ill. 152 (Dis.).

Carbine v. Fox, 98 Ill. 146 (Dis.).

McIntyre v. Yates et al., 100 Ill. 475 (Dis.).

Pinneo et al. v. Knox, 100 Ill. 471 (Dis.).

Clement v. Reitz, 103 Ill. 315 (Dis.).

Mechanic lien same as mortgage lien.

Akin v. Cassiday, 105 Ill. 22 (Dis.).

Cited in 190 Ill. 17 and 165 Ill. 31.

Kingsbury v. Sperry et al., 119 Ill. 279 (Dis.).

C. B. & Q. v. Watson, 105 Ill. 217 and 609.

Land Co. v. Peck, 112 Ill. 408 (R. R.).

Williams v. Spitzer, 203 Ill. 505 (R.).

Hollingsworth v. Koon et al., 113 Ill. 443 (R. R.).

Appeal from appellate court.

Van Meter, Receiver, et al. v. Thomas et al., 153 Ill. 65  
(Dis.).

Beach v. Peabody, 188 Ill. 75 (Ap. Dis.).

Adamski v. Wieczorek, 181 Ill. 361 (Dis.).

Bill to have a deed declared a mortgage.

Carbine v. Fox, 98 Ill. 146 (Dis.).

Tormohlen v. Walter, 175 Ill. 442 (Dis.).

Writ of error to reverse a decree of foreclosure.

#### MISCELLANEOUS CASES

#### FRANCHISE OR FREEHOLD NOT INVOLVED. NO RIGHT OF APPEAL TO THE SUPREME COURT

La Fleure v. Seivert et al., 188 Ill. 525 (Dis.).

Adkins et al. v. Beane et al., 135 Ill. 530 (Dis.).

Ryan v. Sanford, 133 Ill. 291 (Af.).

Bill to redeem. No freehold.

Wilkinson v. Gage, 133 Ill. 137 (Dis.).

Bill to set aside a decree.

Herdman et al. v. Cooper et al., 125 Ill. 359 (Dis.).

Bill to enjoin sale on execution.

Lynch v. Jackson et al., 123 Ill. 360 (Dis.).

Bill to have a deed declared a mortgage.

Malaer et al. v. Hudgens, 130 Ill. 225 (Dis.).

Smith, Admx. et al. v. Gallentin, 171 Ill. 423 (Dis.).

Bill to enforce the specific performance of a contract.

McDole v. Shepardson, Exr., 156 Ill. 383 (Ap. Dis.).

Forcible detainer does not involve a freehold amount involved that determines the jurisdiction of the Supreme Court can be ascertained by the affidavit in the record.

Schofield et al. v. Pope, 104 Ill. 130 (Dis.).

Forcible detainer.



**Kepley v. Luke**, 106 Ill. 395 (Dis.).

Forcible entry.

**Yokem v. Lovell**, 107 Ill. 209 (Dis.).

**De Haven v. Sherman et al.**, 131 Ill. 115 (Dis.).

Bill for the construction of a will. Question.  
Whether an annuity payable out of annual rents is  
a charge against the estate.

**Chicago, City of, et al. v. Rothschild & Co. et al.**, 212 Ill.  
590 (Dis.).

Rights of elevated railroad in street under a city  
ordinance is a license and not a franchise within  
meaning of sec. 88 Practice Act.

**Van Tassell v. Wakefield**, 214 Ill. 205 (Dis.).

Order on defendant in ejectment.

**Payne et al. v. White et al.**, 207 Ill. 562 (Dis.).

Bill to cancel executory contract.

**People v. W. Chicago St. Ry. Co.**, 203 Ill. 551 (R. R.).

Proceeding for mandamus to compel street rail-  
road company to lower its tunnel, does not involve a  
franchise or a constitutional question. Cause re-  
manded to appellate court for consideration.

**Keating v. Hayden**, 132 Ill. 308 (Ap. Dis.).

Validity of right of way involved. Not directly a  
freehold.

**Green v. Goff**, 153 Ill. 534 (Af.).

Bill to enjoin an obstruction to an easement does  
not involve a freehold.

**Goodkind v. Bartlett**, 136 Ill. 18 (Dis.).

Bill to enforce specific performance.

Zinc Company v. La Salle, City of, 117 Ill. 411 (Af.).  
Appeal from appellate court.

Pitts v. Looby, 142 Ill. 534 (Writ Dis.).  
Appeal from justice of the peace. Freehold only  
incidentally involved.

Johnson v. McDonald et al., 196 Ill. 394 (Dis.).  
Proceeding to set aside execution.

Charleston Bank v. Brooks, 197 Ill. 388 (Dis.).  
Idem proceeding and cancelling certificate.

Schoendubee v. In. B. L. & In. Union, 183 Ill. 139 (Dis.).  
Bill to have a deed declared a mortgage and for  
redemption—no freehold involved.

Talcott v. Schuh et al., 95 Ill. 201 (Dis.).  
Bill to compel the removal of a dam which it is  
alleged caused complainant's land to be overflowed.

Kerr, Jr., v. Brawley, Guardian, 193 Ill. 205 (Dis.).  
Brownmark v. Livingston et al., 190 Ill. 412 (Dis.).  
Bill in equity. True boundary line between mort-  
gage premises.

Murphy et al. v. The People ex rel., 221 Ill. 127 (Dis.).  
Freehold not involved on writ of error to review a  
judgment of mandamus to compel a proper officer to  
enforce judgment against real estate for delinquent  
special assessment.

Herman v. Comrs. of Highways, 197 Ill. 94 (Dis.).  
Action before a justice of the peace for violation of  
the statute in reference to trimming hedges along the  
highways.

Seidschlag v. Antioch, Town of, 198 Ill. 413 (Dis.).  
Action before a justice of the peace for obstructing  
a highway.

**Wilkinson v. Gage, 133 Ill. 137 (Dis.).**

Bill to set aside a decree of foreclosure for fraud.

**Kronenberger et al. v. Heinemann, 190 Ill. 17 (Dis.).**

Bill to have sale under decree of foreclosure set aside and certificate cancelled.

**Murphy Case, 221 Ill. 127.**

**Denver, First Nat. Bank v. Gibson, 221 Ill. 295 (Dis.).**

Proceeding to set aside executor and sale and certificate of sale.

**Hutchinson v. Spoehr et al., 221 Ill. 312 (Dis.).**

A partition decree should be taken to the appellate court where the only question is whether the decree was correct in holding the interests of one of the co-tenants subject to inchoate right of dower and to the lien of a decree entered by suit brought by her against him for separate maintenance.

**Hofmann Brothers Brewing Co. v. Cicero, Town of, 223 Ill. 155 (Dis.).** Bill to enjoin track elevation.

**Glos v. Sanitary Dis., 224 Ill. 272 (Dis.).**

Freehold not involved on bill to enjoin the issuing of a tax deed.

#### THE RIGHT OF A GUARDIAN TO RESIGN IS A STATUTORY RIGHT

Our statute says that a guardian may resign his trust, if he first settles his accounts. Chap. 64, sec. 39, R. S. 1874. Passed April 13th, 1849.

**Young et al. v. Lorain et al., 11 Ill. 624 (R. R.).**

**Wackerle v. People, 168 Ill. 250 (R. R.).**

Selling a minor's land is a statutory proceeding.  
See Tyler on Infancy & Cov., 298.

## JOINT OBLIGATIONS EXCLUDING PARTNERSHIP OBLIGATIONS

In 1845 (chap. 76, sec. 3 R. S. 1874) the statute made all joint obligations and covenants joint and several.

The common law rule was:

In actions *ex contractu* against several defendants, the judgment must be against all or none.

Ladd and Taylor v. Edwards, 1 Breese, 139.

Action against 3 joint obligors; 2 served with process; 1 appeared by attorney; judgment v. 2; discontinued as to one error.

Kimmel v. Shultz, Breese, 128.

Judgment must be against all defendants or none, unless a personal defense is interposed—as infancy, etc.

Russel et al. v. Hogan et al., 1 Scam. 552 (R. R.).

Error to discontinue as to one and give judgment against the remainder. Defendants were declared against as joint makers of a note under the firm name of —— & ——.

Hoxey v. Macoupin, County of, 2 Scam. 36 (R. R.).

Action of debt on bond three served and judgment v. one held error.

Teal v. Russell et al., 2 Scam. 319 (R. R.).

Jones et al. v. Wright et al., 4 Scam. 338 (R.).

A plaintiff can bring error to reverse his own judgment.

O'Conner et al. v. Mullen, 11 Ill. 116 (R. R.).

Error to issue judgment v. both when only one is served.

Davidson, Adm. et al. v. Bond et al., 12 Ill. 84 (R.).

Dow v. Rattle, 12 Ill. 373 (R. R.).

Evans et al. v. Gill et al., 25 Ill. 116 (R. R.).

Declaration on a promissory note against two defendants; both served but only one in time for the return term. A judgment was rendered against one of them, and a writ of *scire facias* ordered against the other one. Held error.

Court says: The statute has failed to provide for a case in which all of the defendants have been served, but a portion of them not in time. In such a case as at common law, the recovery must be against all or against none of them. A portion of them not being served in time, are entitled to a continuance, and the statute has not authorized a recovery against those duly served with process.

Fuller v. Robb, Imp., etc., 26 Ill. 246 (R. R.).

Mitchell et al. v. Brewster et al., 28 Ill. 163 (Af.).

John K. Mitchell and Joseph M. Brewster sign a promissory note reading "we promise to pay." Judgment was entered up by confession against John K. Then thereafter both John K. and Joseph M. were sued. A judgment rendered for the defendants was affirmed.

Court observes: "These were joint notes. And the question is presented as to what was the effect of a recovery against one of the several makers, without embracing the others in the proceeding. It has been repeatedly held by this court, that a recovery against one of the several persons jointly liable, releases the others, and forms a complete bar to a recovery against them." Citing:

Warren v. McNulty.

Thompson v. Emmett.

Moore v. Rogers.

Faulk v. Kellums, 54 Ill. 188 (R. R.).

### JOINT OBLIGATIONS

Statute does not apply to partnership obligations.

Coates v. Preston et al., 105 Ill. 470 (Af.).

Schott v. Youree, 142 Ill. 233 (Af.).

The doctrine of Thompson v. Ewert, 15 Ill. 415, as to all or none being held applies to common law—not a bond in a statutory proceeding. Examine this.

Sandusky v. Sidwell, 173 Ill. 493 (Af.).

Suit on partnership obligation; both partners resided in Cook county; suit brought in Vermilion county and service had on one of the defendants while he was passing through the county of Vermilion on a public train.

Point. In order that a summons may issue to a foreign county to bring in one of the defendants not served in the county where the suit is brought, the other defendant must be a resident of the county where the suit is brought.

Mayer v. Pick, 192 Ill. 561 (Af.).

A joint power of attorney does not warrant a confession on a note signed by two (one deceased.)

The Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61 (Af.).

See rule referred to.

Fleming v. Ross, 225 Ill. 149 (Af.).

Section 3 of the act on joint obligations does not apply to partnership obligations. See authorities reviewed and sec. 3 chap. 76 and sec. 9 of chap. 110 construed and compared.

If one elects to sue jointly under the statute, that is, gets a judgment against each defendant separately; he can not thereafter bring a joint action against all.

See *Gould v. Sternberg, Adm., etc.*, 69 Ill. 531 (R. R.). See this *idem* subject referred to in *People v. Harrison*, 82 Ill. 84.

### STATUTORY PROCEEDINGS

Under the statute (Practice Act, sec. 6, 1845; sec. 9, 1874; sec. 14, 1907.

On a joint liability, a judgment may be taken against one person resident in the county and duly served, and a *scire facias* issue to the sheriff of the county to bring in the other defendants not served and have them show cause why they should not be made party to the judgment.

*Felsenthal et al. v. Durand et al.*, 86 Ill. 230 (R. R.).

*Sherburne v. Hyde*, 185 Ill. 580 (Appellate Court reversed, Circuit affirmed).

Here court says: "Section (9) of the practice act does apply to partnership contracts and obligations, and that what was said to the contrary in the case (*Sandusky v. Sidwell*, 173 Ill. 493) should be so far qualified."

Here the court below rendered judgment against Hyde alone for the partnership debt of Grace and Hyde. "Grace did not appear, and, though within the jurisdiction and named in the writ, was not served."

Joint debtors sued (Practice Act 1874, sec. 11; and Practice Act, 1907, sec. 24) and one or more served, pendency of suit or recovery of judgment against those served, no bar on original cause of action against those not served, when action is brought against them in any other

place or county than in county where first suit was brought.

*Finch v. Galigher*, 181 Ill. 625 (R. R.).

Judgment obtained in New York against one of two partners; the other partner was not served and did not live in New York. Afterwards a suit was brought in Illinois against the other partner.

Court observes: The section of the statute "is equivalent to an express enactment that such prior judgment against one shall not be a bar to an original action against another joint obligor."

#### JOINT TENANTS MADE TENANTS IN COMMON

That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend or pass by devise, and be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common. Section 1, chapter 76, R. S. 1874.

No estate in joint tenancy, in any lands, tenements (or) hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common."

Section five (5) chapter 30, R. S. 1874.

*Mette et al. v. Feltgen*, 148 Ill. 357 (R. R.).

*Slater v. Gruger et al.*, 165 Ill. 329 (R. R.).

Here the granting clause in the deed says: "The



conveyance herein is made to said grantees in joint tenancy." Held sufficient to take the conveyance out of the operation of the statute.

Cover v. James, 217 Ill. 309 (R. R.).

Here the wording of the deed was: "In case of the death of either \* \* \*, the other to have the whole of said property without litigation." Held that the wording was sufficient to take the deed out from under the operation of the statute.

Gaunt v. Stevens et al., 241 Ill. 542, Gaunt Appellant (R. R.).

#### JUSTICE OF THE PEACE

The civil jurisdiction of a justice of the peace is solely by virtue of the statute.

The strictness of the rule is illustrated in *Evans v. Pierce et al.*, 2 Scam. 468 (R. R.). A party wrote a letter to a justice of the peace directing him to enter judgment against him. In holding the judgment void, the court observes: "The law having prescribed a different mode of acquiring jurisdiction of the person of the defendant, it must be strictly pursued, and can not be varied at the will of the party or the justice."

In *Bines et al. v. Proctor et al.*, 4 Scam. 174 it was held a defect in a summons (no year stated) was cured by appeal.

*Williams et al. v. Blankenship et al.*, 12 Ill. 122 (R. R.).

In *Nelson v. Rockwell*, 14 Ill. 375 (R. R.) it was held that a judgment rendered by a justice of the peace, where the appearance of the defendant had been entered by a third person and without authority, was void and could be enjoined in equity.

In *Weinz v. Dopler*, 17 Ill. 111 (R.), a justice of the peace rendered a judgment upon an award and

the court observes: No suit was pending between the parties; "The award could have no other effect than at common law, and gave the justice no jurisdiction to render judgment against Weinz without service of summons or appearance."

In *White v. Wagar*, 185 Ill. 195 (Af.), a certiorari proceeding it is said by the court: a justice court "can exercise no powers except those conferred by the statute, and whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void."

In *Jackson v. Hobson*, 4 Scam. 411 (R. R.) is stated: Rule of protection of an officer under a writ: A sheriff was sued for taking the goods of A. The writ was against B. Held not necessary for the sheriff to set out the judgment in addition to the writ under which he acted.

*Jackson v. Hobson*, 4 Scam. 411 (R. R.).

In *Parker v. Smith*, 1 Gil. 411 (R. R.), the writ issued from a justice of the peace and it was held that the law had been correctly laid down, as to officers acting under process in the case of *Jackson v. Hobson*, *supra*.

See *Nickerson v. Rockwell*, 90 Ill. 460 (Af.), for rule of consolidation of causes of action against the same party or parties, R. S. 1874 chap. 79, sec. 49.

In *Cox v. Spurgin*, 210 Ill. 398 (Af.), under section 7, art. 18 Justice and Constables Act (Laws of 1895, p. 223) it was held that a judgment rendered in an action imposing a fine could not be the basis of a transcript by which to secure a lien upon real estate through record of the same in the office of the clerk of the circuit court. To the contention that the power had been granted through these words: "and proceedings may be had thereon as upon other executions" the court replies: "Justices of the peace in this state have only limited jurisdiction. They

have and can exercise no powers other than those conferred by statute, and if they assume jurisdiction in cases not so authorized, their acts are null and void (*White v. Wagar*, 185 Ill. 195). All acts creating courts of limited jurisdiction are to be strictly construed and the powers of such courts will not be extended, by implication further than is necessary for the exercise of the jurisdiction expressly conferred upon them."

#### JUSTICE OF THE PEACE—SPECIAL STATUTORY JURISDICTION

Justices of the peace shall have jurisdiction: "In actions for damages to real property."

Sec. 13, Ch. 79 R. S. 1874, p. 639.

*Lachman v. Deisch et al.*, 71 Ill. 59 (Af.).

*Taylor et al. v. Koshetz*, 88 Ill. 479 (Af.).

*Cobine v. McKittrick*, 186 Ill. 324 (Ap. Dis.).

*Dolton, Village of v. Dolton*, 201 Ill. 155 (R. R.).

An affidavit that supports the action of a justice of the peace must contain all the statutory averments.

An officer sued in trespass for invading the possession of real estate, attempted to defend under an affidavit, in an action of forcible entry and detainer, which omitted the statutory words:—and before obtaining a deed of conveyance—In sustaining the judgment against the officer and holding that the justice did not have jurisdiction the court observes:

"In courts of special and limited jurisdiction, the rule is strict, that the party becomes a trespasser who extends the power of the court to a case in which it can not lawfully be extended." *Haskins et al. v. Haskins*, 67 Ill. 446 (Af.).

*Evans v. Bouton (replevin)*, 85 Ill. 579 (R. R.).

Unsuccessful collateral attack in law upon a judgment rendered by a justice of the peace under an affidavit in replevin. A constable was sued in trespass for taking

household furniture under a writ of replevin. Judgment was rendered for \$927.

It was contended that the justice had no jurisdiction because the value of the property exceeded \$200. The court held that the owner of the property having been served with process, had a right to appear and show that the value of the property exceeded the jurisdiction of the justice but having made a default, the finding of the justice that he had jurisdiction could not be attacked collaterally. *Rice et al. v. Travis* (trespass), 216 Ill. 249 (R. R.).

#### SELLING LAND UNDER A TRANSCRIPT FROM A JUSTICE OF THE PEACE .

Section 95, chap. 79, R. S. 1874.

“The issue of an execution and its return by the proper officer is made by statute, a condition precedent to the power of the justice to certify such transcript to the circuit clerk.

*Hobson v. McCambridge et al.*, 130 Ill. 367 (Af.).

*Merrick v. Carter*, 205 Ill. 73 (Af.).

Here the execution issued by the justice recited that execution was returned “no part satisfied.” Held that this was not sufficient. That might all be true and yet the debtor have sufficient property to pay, etc.

#### LIEN UPON REAL ESTATE

Said judgment shall be a lien on such lands, tenements and real estate from the last day of the term of the court in which the same may be rendered, for the period of seven years, etc. Revised laws of 1833, page 370.

Clerks to keep an alphabetical docket of all judgments. Duty of clerk to enter in such docket all final judgments and decrees rendered in alphabetical order by the name of the person against whom the judgment or decree was entered.

Section 29, Session Laws of 1827. See Revised Laws of 1833, page 493.

A judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained within the county for which the court is held from the time the same is rendered or revived for the period of seven years. Sec. 1, Ch. 77, R. S. of 1874. (See Ed. of 1906, p. 1253.)

Clerks of circuit courts shall keep two well bound books. Plaintiffs and "defendant's index to court records." Said book shall set forth the names of the parties, kind of action, etc. The defendant's index shall be ruled and printed in the same manner as the plaintiff's, except parties shall be reversed. See Session Laws of 1865, p. 79. And *Whitney et al. v. Ullman*, 37 Ill. 423.

*Bustard et al. v. Morrison et al.*, 1 Scam. 235 (Af.).

Statute makes judgment lien upon land within the county where the judgment is rendered.

*Elkins et al. v. The People*, 3 Scam. 208 (Af.).

Facts: Sureties on a sheriff's bond were sued for money received by the sheriff on redemption after he had gone out of office. In holding the sureties liable the court observes: "The rule of the common law is, that the officer who has received and levied an execution, must perfect it, by doing every act required to be done under or by virtue of the execution. The whole proceeding is regarded as an entire thing. And although lands are not liable to be taken and sold under an execution, at common law, yet where by statute they are subjected to be thus taken and sold, the officer in whose hands the process may be, will be bound to conform to the rules governing the proceedings under an execution levied upon chattels, unless a different proceeding is prescribed. \* \* \*

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The statute of this state has subjected lands to be sold under execution.

But section 11 of the statute says that the defendant is authorized to pay the redemption money to the officer who sold the land, "whether in or out of office."

Court says the common law rule is that a sheriff is authorized to complete, after the expiration of his office, all business that he has commenced prior thereto. This would include the receipt of the redemption money for land that he had previously sold under execution.

**Union Nat. Bank v. Lane, 177 Ill. 171 (Af.).**

The lien created by law on property shall not abate or cease by reason of the death of any plaintiff or plaintiffs; but the same shall survive in favor of the executor or administrator of the testator or intestate, whose duty it shall be to have the judgment enforced in manner aforesaid. Ses. Laws 1841, p. 168.

A foreign administrator can not sue in the courts of this state under and by virtue of this statute.

**The People v. Peck, 3 Scam. 118.**

Motion by foreign administrator for a mandamus against the clerk of the circuit court to record his foreign letters denied.

**Rogers v. Brent, 5 Gil. 573 (R. R.).**

A party who holds a certificate of entry upon land has such an interest in land as is liable to be levied upon and sold under execution, although the debtor has assigned the certificate and a patent has issued to the assignee.

**Pickett v. Hartsock, 15 Ill. 279 (R. R.).**

An execution issued upon a judgment without giv-

ing the executor notice, no title passes. When the sheriff's deed is offered, no title passes unless a judgment is offered to support the deed.

Scammon et al. v. Swartwout, 35 Ill. 326 (Af.).

Court says: "It is by statute alone that a lien by judgment exists at all on real estate, and, therefore, it must be controlled by the statute."

Tenney et al. v. Hemenway, 53 Ill. 97 (Af.).

In this case a levy was made on land within the seven year period and while the judgment was a lien but the sale was not made till after the judgment had ceased to be a lien that is till after the expiration of the seven years. The court in holding that the sale was too late says: "The lien of judgments on real estate, and the power to sell land under execution, is regulated alone by statute. The lien only attaches and becomes effective by force of the statute, and only in the mode, at the time, and upon the condition and limitations imposed by it. It receives no vigor or even aid from the common law, to which it was unknown. The statute has not, in terms, nor has it, so far as we can see, by implication, given the same force to the levy on land under an execution, to create a lien, that arises from the rendition of a judgment."

Hernandez v. Drake, 81 Ill. 34 (Af.).

This was a collateral attack upon an attachment sale under a special execution. The first execution that issued was void because there was no seal of or signature of the clerk. A sale was had under the void execution. After four years this error was discovered and the plaintiff made a motion to vacate the sale and have another execution issue and another sale which was done. Then the question arose

whether the execution was not void because it had not issued within a year and a day of the date of the judgment. But the court says that the statute with reference to liens of judgments upon real estate, has not changed the rule of the common law, which was that an execution issued after the expiration of one year and a day was voidable; the defendant could make a motion to have it quashed, otherwise it would be capable of sustaining a sale. The neglect of the defendant to make this motion creates a counter presumption as to the execution or judgment being satisfied.

*Cottingham et al. v. Springer*, 88 Ill. 90 (Af.).

In this case the mortgagee sued out an execution on a judgment recovered upon the mortgage debt and levied upon the land and afterwards got a sheriff's deed. The point was made in an ejectment case that the land was not subject to levy and sale because an estate in equity was in the mortgagor. The court in overruling this point observes:

"Anciently, land could not be sold by the person claiming its ownership, etc. \* \* \*" The legislature further extended the liability of equitable titles and interests in lands to sale on execution at law by the first section of the chapter judgments and executions, R. S. 1845, p. 300. This section creates a lien on land, etc."

*Sapp v. Wightman*, 103 Ill. 150 (R. R.).

*Sapp v. Wightman*, 103 Ill. 150 (R. R.).

"The liens created by judgments and decrees of the circuit courts in this state are purely statutory." Court has no power to extend the lien of a decree beyond the territorial limits of the county.

See *Rock Island National Bank et al. v. Thompson et al.*, 173 Ill. 593 (Af.), on the point that the lien of a



judgment of a Federal court is co-extensive with the Federal court's territorial jurisdiction.

LIMITATION—STATUTE OF 1835

An Act to amend an act for the limitation of actions, and for avoiding vexatious law suits approved Feb. 10, 1827. In force Jan. 1, 1835.

Section 4, R. S. 1874 page 674.

The difference between this statute and the one passed in 1839 is well pointed out in *Irving v. Brownell*, 11 Ill. 402 (R. R.).

Court: "The statute of 1835 does not require that the person who would avail himself of its provisions should have a claim and color of title but simply required a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the law of the state to sell such land for non-payment of taxes. The auditor's deed in this case is just such a title. On its face it is perfect and complete."

The word "title" as used in the act of 1835, should not therefore be construed to mean a perfect title, nor is the word in its ordinary acceptation, understood in such restricted sense.

*Lender v. Kidder*, 23 Ill. 49 (R. R.).

*Williams v. Ballance et al.*, 23 Ill. 193 (Af.).

*Jandon et al. v. McDowell, Jr.*, 56 Ill. 53 (Af.).

Facts: Joseph Duncan had a patent to a tract of land. In an ejectment suit, both parties claimed through him. The party who had the second deed got into the possession of the land and paid the taxes for seven years and it was held that under this limitation statute his right should prevail.

Court: "Defendant in error has shown a connected title from the general government to himself, by patent and mesne conveyances. This is *prima facie* a title in fee at law, and is the kind of title contemplated by the statute of 1835. Had the defendant in error held the first deed from Duncan, then his title would have been amply good without the bar of the statute. But only being apparently the better title, and being connected by deeds purporting to convey the fee, it is the legal title contemplated by the statute, and is entitled to its protection."

"Nor is it any objection that the deed first made was on record when Duncan conveyed to Owen, and that he was charged with notice by their record. In cases of *Woodward v. Blanchard*, 16 Ill. 433, and *Dickenson v. Breeden*, 30 Ill. 280, it was held that the recording laws had no effect on questions arising under the statute of limitations."

#### LIMITATIONS—STATUTE OF 1839

An Act to quiet possession and confirm titles to land.

That hereafter "every person in the actual possession of land or tenements, under claim and color of title made in good faith, and who shall, for seven successive years after the passage of this act, continue in such possession, and shall also during such time, pay all taxes legally assessed on such land or tenements, shall be held and adjudged to be the legal owner of said land or tenements, to the extent and according to the purport of his or her paper title."

Section 1, Session Laws 1839, page 266.

Section 8, R. S. 1845, ch. 24, page 104.

Section 6, R. S. 1874, ch. 83, page 674.

*Irving v. Brownell*, 11 Ill. 402 (R. R.).

Ejectment. Reversed to allow defendant to supply further proof, if he could.

With reference to the first section the court observes: "The object of this statute clearly was to protect those who, supposed that they had a good title to land, should take and continue the actual possession thereof, and pay taxes upon the same for the space of seven years.

"Three things are necessary and must concur to enable a party to avail himself of this statute:

"1st. He must have a claim and color of title to the land made in good faith.

"2nd. He must have and continue in the actual possession thereof for seven successive years.

"3rd. He must pay all taxes legally assessed upon said land during said seven years.

"Color of title: What the claim and color of title must be, that will enable a party to take advantage of this statute, is a question of some difficulty."

After saying it must have been the intention of the legislature to require a different sort of title under this seven year clause from that of the 20 year clause, the court concludes thus:

With reference to the term "good faith" "it is manifest that the legislature only intended to protect those who had been in the possession of land, and paying taxes upon it under the belief that they had a good title."

When would a reasonable man suppose that he had a claim and color to land, or what sort of a title would such a man, in good faith pay out his money for?

For none other, we imagine, than what he suppose to be a good title. If he knew he was not acquiring such a title, or if the circumstances were such, that a reasonable man might know that the title he was obtaining was wholly defective, then it would not be a title obtained in good faith, and consequently not entitled to the protection of the act of 1839.

By the words claim and color of title made in good

faith "must therefore be understood such a title as tested by itself, would appear to be good—not a paramount title—capable of resisting all others, but such a one as would authorize the recovery of the land when attacked as no better title was shown: that is a *prima facie* title."

All this is a quotation from Judge Trumbull's Opinion.

Lafin v. Herrington et al., 16 Ill. 301 (Af.).

Ejectment.

Holloway et al. v. Clark, 27 Ill. 483 (R. R.).

Ejectment tax deed—Quit claim deed. Seven years payment of taxes under color not shown.

Brooks v. Bruyn, 35 Ill. 392.

Ejectment. A tax deed is color.

Paullin v. Hale, 40 Ill. 274.

Ejectment affirmed. Second section of the statute construed.

In this case the plaintiff relied upon color of title payment of taxes seven successive years and actual possession during said time. In holding that plaintiff could recover the court observes: It is "the settled law, that where the benefit of the bar, under the statute, has once been acquired the right of possession thereby attaches to the occupant and remains with him, even if he temporarily leaves the possession, and enables him to recover the possession as against all persons as to whom his bar, if set up in defense, would have been available." Quoted from page 277. See this modified in *McCagg v. Heacock*, 42 Ill. 153 (R. R.).

Kibbie v. Williams, 58 Ill. 30 (Af.).

Ejectment. Husband claiming in wife's land.

Kelly et al. v. Donlin et al., 70 Ill. 378 (Af.).  
Partition.

Wilson v. South Park Com., 70 Ill. 46 (Af.).  
Ejectment by appellant second section of statute.

Kane v. Footh, 70 Ill. 587 (Af.).  
Ejectment. Title under statute made.

Scott v. Delany, 87 Ill. 146 (Af.).  
Ejectment. Sheriff deed—color.

Conner et al. v. Goodman, 104 Ill. 365 (Af.).  
Iberg et al. v. Webb, et al., 96 Ill. 415 (Af.).  
Seven full years must elapse to effect a bar. Part  
performance can not be had under sections 6 or 7 of  
the statute.

P. D. E. R. Co. v. Forsyth, 118 Ill. 272 (Af.).  
Ejectment.

Riggs et al. v. Girard et al., 133 Ill. 619 (Af.).  
Ejectment. Sheriff deed; color.

Sontag v. Bigelow et al., 142 Ill. 143 (R. R.).  
Catlin Coal Co. v. Lloyd, 176 Ill. 276 (R. R.).  
Section 7.

Keppel et al. v. Dreier et al., 187 Ill. 298 (Af.).  
Good faith; color; defined.

Godfrey v. Dixon Power Co., 228 Ill. 487 (Af.).  
Ill. Cent. R. Co. v. Cavins, 238 Ill. 380 (R. R.).

“Three things must concur to establish a title by  
limitation under said section 6: (1) Color of title;  
(2) possession under claim and color of title made in  
good faith for the requisite time; and (3) payment of

all taxes legally assessed for seven successive years." Here there was a failure to show that all taxes had been paid.

### GOOD FAITH

Section two of statute of 1839.

This section declares that the person having color—made in good faith to vacant and unoccupied land—shall pay all taxes, etc., shall be deemed and adjudged to be the legal owner of said, etc. This section would seem to transfer the title from one man to another.

Held unconstitutional in *Harding v. Butts*, 18 Ill. 502 (R. R.); *Lee v. Newkirk*, 18 Ill. 550 (Af.).

It is to be noticed that the party here claiming the benefit of the statute did not have possession of the land. Attention is called to this fact on page 277, volume 40.

*Newland v. Marsh*, 19 Ill. 376 (R. R.).

Ejectment issues found for the plaintiff.

Second section of the statute of 1839 assailed on constitutional grounds. The defendant relied upon color of title.

After referring to the second section and authorities in other states the court observes: "We hold this section to be a limitation law, barring the action, and nothing more, and it follows therefore that when the party in whose favor the limitation has run, is in a position to use it—is sued—he may invoke the law in bar of the action.

"The statute commences to run when the party having color of title begins payment of the series of taxes, and the bar is perfected when the payment of that series of taxes, under the color of title, is complete," quoted from page 385.

"The theory of limitation laws is, that they affect the remedy—limiting the period within which rights

may be asserted or remedies resorted to—affording a time and opportunity of enforcing rights by legal remedies, and leaving the right untouched, but regulating or limiting the use of the remedy for assertion of the right of recovery of the thing to which it relates. And upon no other ground can the second section of the Act of 1839 be upheld and enforced, as within the limits of the legislative power.” Quoted from page 384-385.

Hinchman v. Whetstone, Plaintiff below.

Trespass *Quare Clausum Fregit*, 23 Ill. 185 (Af.).

The plaintiff set up claim and color of title, payment of taxes for seven successive years coupled with possession. Under section 1, limitation law of 1839. The court in sustaining plaintiff's title thus observes:

“This section of the act (1839) having been uniformly held to be a limitation law, it must be held to produce the same effect and to confer the same rights as do other limitation laws. And we have seen that where the statute has tolled both the right of entry and the right of action, the remedy of the owner is gone, and he is precluded from asserting his right or setting up his title against the party relying upon the statutory bar.” Quoted from page 191.

“It then follows that appellee had acquired all the rights which the first section of the statute can confer, prior to the commission of the acts complained of, that his right to recover was complete, whether he was in or out of the actual occupancy of the premises, and this too against the former owner as well as all others.”

Further the court says: quoting from page 190 “While the statute has not transferred his title, nor can it have that effect, it does transfer his right of possession, and the title that remains is more in

name than in substance. But holding his title, he is postponed or prohibited by the statute from asserting it against the person holding the right of possession, until that right becomes extinct, or is united to his own right of property. And such is the operation of all limitation laws which deprive the owner of both the right of entry and the right of action. And this principle is recognized by this court in the case of *Newland v. Marsh*, 19 Ill. 376."

*Jacobs v. Rice*, 33 Ill. 369 (Af.).

*John C. Jacobs v. William Rice*. Ejectment.

Court: "The appellee entered into the possession in 1852, under color of title acquired in good faith; and from that time until the commencement of this suit in 1863 has resided on the premises and paid all taxes assessed thereon."

When bar is effected title transferred:

Court: "By its (statute) operation the life estate of Dustin was vested in the appellee, and he now holds it in the same manner and with the same rights that he would have had, if Dustin had conveyed the same to him."

This above is *obiter dicta*. See page 383, volume 180. *Field v. Peeples et al*.

*Paullin v. Hale*, 40 Ill. 274 (Af.).

*T. Judson Hale v. Daniel Paullin*, ejectment; plaintiff claims under color; defendant appeals.

The defendant was in possession at the time the suit was begun and his title was traced of record back to a patent from the government.

The plaintiff proved the payment of taxes for seven successive years, 1842 to 1849 inclusive, that the land had been vacant and unoccupied; land had been broken, fenced; that it had been raw prairie; that plaintiff occupied the land from 1858 to 1862 by himself and tenants.



In February, 1864, one Drinkle, for the defendant put a small building upon the land.

In discussing the second section of the limitation law, the court observes: "As was said in *Hinchman v. 23 Ill. 185*, a right to land acquired by limitation is affirmative and can be enforced. It gives the owner of such a right the aid of the law to protect him in that possession against all intrusion into, or trespass upon, the premises by whomsoever made, precisely as if he were the owner of the paramount title."

In differentiating the *Harding* case, 18 Ill. 507, from the *Hinchman* case 23 the court says that in the first the party claiming under color had never been in possession.

Again: "Ever since the case of *Newland v. Marsh*, 19 Ill. 376, it has been the settled law of this court, that this second section can not be used as a sword unaccompanied by possession and to that rule we intend to adhere. But since the decision of the *Hinchman* case, we regard it equally as settled law. That where the benefit of the bar under the statute has once been acquired, the right of possession thereby attaches to the occupant and remains with him, even if he temporarily leaves the possession, and enables him to recover the possession as against all persons as to whom his bar, if set up in defense, would have been available. Until the owner of the color of title has united actual possession to the color and to the payment of taxes he is in no position to invoke the aid of the second section.

Isaac Cook, plaintiff in ejectment, 43 Ill. 391 (R. R.) v. Jehiel F. Norton, 48 Ill. 20 (Af.).

The land had been sold under a judgment that was a lien upon the land; thereafter the judgment debtor sold the land and thereafter his grantee set up: Color of title, payment of taxes and possession.

Court: (the defendant set up color) "This court has also uniformly held, that under the act of 1839, the recording law will not be regarded; that limitation laws do not proceed upon the theory of the absence of notice of an adverse claim to the premises. The act itself makes no reference to notice of an adverse claim. So being within the provision of the limitation laws, a party need not show, that he acquired title or occupied the premises without notice that they were claimed by another. And having brought himself within the provisions of the act, the bar of the statute will not be destroyed, by proving that he had either actual or constructive notice of an adverse claim. To give the statute such construction, would be to hold that the statute could never run against the better title of record, where there was actual notice, or notice of such facts as should put a purchaser upon inquiry. We are aware of no decision, and it is believed that none exists, which holds, that notice of an adverse claim will prevent the running of the statute, or will defeat its bar, when in other respects the party has brought himself within its provisions." Quoted from page 393-4 of the 43rd.

Widow may be barred of her dower under section 1 of the statute of 1839.

Owen v. Peacock, 38 Ill. 33 (Af.). Leading case.

Facts. The husband had conveyed the land but the wife did not join in the deed. Husband died in 1835; the widow demanded dower in 1864. Petition for dower being filed. The defendant set up as a bar the statute of 1839.

The court, after saying that a new question is presented thus concludes: "Without deciding, then, whether the suit for dower is or is not included by

the terms of the general limitation acts of this state, we are content to say the defendant is protected in his possession and title by the first section of the act we have cited." Act of 1839, section 1, Emeline Owen, petitioner and plaintiff in error.

**Brian v. Melton**, 125 Ill. 647 (R. R.).

The bar of the statute was held to apply to a deed executed by an administrator in compliance to a decree of sale.

The court in holding that the administrator's deed is color of title thus observes: "A party, holding under a deed as color of title, is not obliged to go back to the proceedings, which precede the deed, to see if there was proper authority for its execution."

Court: "Nor is it evidence of a want of good faith required by section six of the limitation law, that the purchaser at the administrator's sale knew of the existence of the widow at that date." "The evidence tends to show that they believed they were getting a good title free of incumbrance. There is nothing in the evidence to indicate that they are chargeable with fraud."

Cases where dower right will not be barred.

**Sill v. Sill**, 185 Ill. 594 (R. R.).

Helen M. Sill died intestate April 15, 1888, seized of 80 acres. Edmund Sill, surviving husband, Oct. 1892, demanded his dower. Charles B. Sill, one of the heirs, filed a bill for partition, Jan. 24, 1899.

Court: "The heir can not set up the statute of limitations against the holder of the dower estate, because his possession is not adverse to the holder of said estate. It is the duty of the heir to assign dower, and, for this reason, his possession is not adverse to the owner of the dower estate." Quoted from page 605.

**Brumback v. Brumback**, 198 Ill. 66 (Af.).

Here the widow was in possession under section 27, Act of 1845, widow's quarantine. Her dower never having been assigned, the statute did not run.

**Woodward v. Blanchard**, 16 Ill. 424 (R. R.).

Here in an action of ejectment, the defendant relied upon an auditor's deed, under which the defendant had taken possession and paid taxes. The judgment was against the defendant.

Court: "We can entertain no doubt in this case, that the auditor's deed at the tax sale is color of title in Woodward, in the true intent and meaning of the statute, and without regard to its intrinsic worth as a title, and without regard to the constitutionality of the laws under which it was derived. We have little reason to doubt the sincerity, honesty of purpose, and good faith of Woodward, in believing it to be a good title, and taking the possession, and paying the taxes under it, relying upon it for his title."

"We are aware that these views do not, nor are we able to accord fully with all the reasoning of the court in *Irving v. Brownell*, 11 Ill. 413, in the construction of the act in relation to claim and color of title."

"Good faith" is doubtless used here in its popular sense, as the usual, existing state of mind; whether so from ignorance scepticism, sophistry, elusion, fanaticism or imbecility, and without regard to what it should be from given legal standards of law or reason."

**Dickenson v. Breeden**, 30 Ill. 279 (Af.).

Ejectment: In *Woodward v. Blanchard*, 16 Ill. 430, it was said that color of title was a question of law, and good faith a question of fact, and that color

of title must be a paper title, and whether originating in a wrong or a right, made no difference.

Cites: *Irving v. Brownell*, 15 Ill. 412; *Dunlap v. Daugherty*, 20 Ill. 404; *Bride v. Watt*, 23 Ill. 507; *Holloway et al. v. Clark*, 27 Ill. 484; *Parker v. Watts*, 27 Ill. 224; *McConnell v. Street*, 17 Ill. 254; *Dawley v. Van Court*, 21 Ill. 460; *Morrison v. Kelly*, 22-626.

#### LEGAL PRESUMPTIONS DEFINED

*McCagg et al. v. Heacock et al.*, 34 Ill. 476 (R.); 42 Ill. 153 (R. R.).

Facts: Bill in equity for leave to redeem. Color of title, payment of taxes, etc., was set up. A deed purporting to convey title was introduced. Court Beckwith, J. See opinion observes: "The law presumes that all acts are done in good faith until there is evidence to the contrary; and color of title is presumed to have been thus acquired, till it is shown to have been acquired otherwise. The good faith, required by the statute, in the creation or acquisition of color of title, is a freedom from a design to defraud the person having the better title."

The "act of March 2, 1839 did not introduce a new mode of acquiring titles, but applied to circumstances peculiar to an unsettled country, a mode of confirming titles, as old as the common law itself.

Legal presumptions are rules established by the common law, or by statute, and are founded upon the first principles of justice or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things."

*Hardin v. Gouveneur*, 69 Ill. 140 (R. R.).

Ejectment. Here the court says, after citing *Shackleford v. Bailey*, 35 Ill. 387, *Blanchard v. Pratt*,

37 Ill. 243, *Woodward v. Blanchard*, 16 Ill. 424: "In a number of cases it has been inaccurately said, that a deed purporting to convey title is claim and color of title made in good faith. The faith whether good or bad, depends upon the purpose with which the deed is obtained, and the reliance placed upon the claim and the color. A party receiving color of title knowing it to be worthless, or in fraud of the owner's rights although he holds the color and asserts the claim, can not render it available because of the want of good faith."

*Henrichsen v. Hodgen et al.*, 67 Ill. 179 (Reversed in part).

A widow conveyed her unassigned dower interest to A; A quit claimed his interest to B, who set up his deed as color of title in a partition. Held not color of title obtained in good faith.

*Davis v. Hall et al.*, 92 Ill. 85 (Af.).

This case was first before the court in *Hall v. Davis*, 44 Ill. 495. On the point of good faith the court says that *Bowman v. Wettig*, 39 Ill. 429, had not been adhered to in later cases.

The court says that it adheres to the view taken in *Woodward v. Blanchard*, 16 Ill. 425, as to what excludes the presumption of good faith. And after citing the *McCagg* case the court observes: "Actual or constructive notice of irregularities or counter claims does not necessarily impute bad faith or fraud in the party chargeable with notice. If the limitation act in question had intended to make freedom from notice one of its requirements it should have added to "claim and color of title made in good faith" the words: without notice.

"It is true we find some decisions and opinions of this court tending to imply that notice excludes good faith."

REPORTING EVIDENCE BY MASTER IN CHANCERY

In the absence of a statute, the master has no right, nor is it his duty to report the evidence.<sup>1</sup>

The master should state conclusions of fact and not conclusions of law. The latter are for the chancellor.<sup>2</sup>

The master's acts are binding only when approved by the court.<sup>3</sup>

No fees can be tax in favor of a master except what are allowed by statute. No fees of a stenographer can be taxed.<sup>4</sup>

STATUTORY RIGHT OF REDEMPTION

Sections 18-27, chap. 77, R. S. 1874.

When the land of a mortgagor or a judgment debtor has been sold under decree or judgment, twelve months are allowed "any defendant, his heirs, administrators, assigns, or any person interested through or under the defendant" to redeem. This is purely a statutory right; it is not subject to sale by any other lien holder.

Merry v. Bostwick et al., 13 Ill. 398 (Af.).

Watson v. Reissig, 24 Ill. 281 (Af.).

Seligman v. Laubheimer et al., 58 Ill. 124 (Af.).

Cook v. Chicago, City of, 57 Ill. 269 (R. R.); Schaeppi v. Bartholomae, 217 Ill. 105 (R. R.).

Heinroth, Appellant v. Frost et al., 250 Ill. 102 (Af.).

1—Hayes v. Hammond, 162 Ill. 133 (Af.), and Schradt v. Davis, 185 Ill. 476 (R. R.).

2—Hurd v. Goodrich, 59 Ill. 450 (Af.); Hayes v. Hammond, 162 Ill. 133 (Af.); Von Platen et al. v. Winterbotham et al., 203 Ill. 198 (Af.); Von Tobel v. Ostrander, 158 Ill. 499 (Af.), and Clavey et al. v. Charlotte Schnadt, 272 Ill. 464 (Af.).

3—Slack v. Cooper, 219 Ill. 138 (Af.).

4—Schnadt et al. v. Davis, 185 Ill. 476 (R. R.); Robey et al. v. Ch. Title Trust Co., 194 Ill. 228 (A. & R.); Hoops et al. v. Fitzgerald, 204 Ill. 325 (Af.); Ruddy Appellee v. McDonald, 244 Ill. 494 (R. R.); reversed because a fee to stenographer was taxed.

The fact that a judgment creditor has been made a party to a bill to foreclose under section 18 as one interested in the premises does not prevent him from redeeming under section 20.

Boynton v. Pierce et al., 151 Ill. 197 (Af.).

#### NOTARY PUBLICS

The power to administer an oath is not one of the incidents of the office of a notary public under the general law merchant. Where this power exists it is by virtue of some statute. See sections two (2) and six (6), chap. 101, page 725, R. S. 1874.

Keefer v. Mason, 36 Ill. 406 (Af.).

Trevor, Jr. et al. v. Colgate et al., 181 Ill. 129 (R. R.).

Desnoyers Shoe Co. v. First Nat. Bank, 188 Ill. 312 (Af.).

#### FOREIGN CERTIFICATES

Foreign certificates of notary must be validated in accordance with section six (6), ch. 101, R. S. 1874.

Smith v. Lyons, 80 Ill. 600 (R. R.).

Ferris et al. v. Com. Nat. Bank of Chi., 158 Ill. 237 (Af.).

Bell v. Farwell, 189 Ill. 414 (Af.).

The statute does not make it the duty of a notary to verify his acts by seal except when taking the acknowledgment of deeds. The circuit court will take judicial notice, who are notaries in the county where the court is.

Stout v. Slattery, 12 Ill. 162 (R. R.).

Schaefer v. Kienzel et al., 123 Ill. 430 (Af.).

See as to contradicting notary's certificate to a deed.

Lewis v. McGrath et al., 191 Ill. 401 (Af.).



PLATS, DEDICATION—STATUTORY ELEMENTS

1. "County Commissioners or other persons," shall cause survey and plat to be made by County Surveyor.<sup>1</sup>

2. County surveyor shall make a certificate of his survey to be endorsed on plat.

3. The plat must be acknowledged by the person<sup>2</sup> causing the survey to be made, before a justice of the Supreme Court, a justice of the circuit court, or a justice of the peace in the county where the land lies.

4. The certificate of acknowledgment must be endorsed on the plat.

5. The certificate of the surveyor and the certificate of the officer taking the acknowledgment must be recorded.

6. The plat shall describe and "set forth all streets, alleys, commons or public grounds, and all in and out lots, within, adjoining or adjacent to said town, giving the names, widths, corners, boundaries and extent of all such streets and alleys."

See Revised Statutes of 1845, chap. 25, section 17 and 20.

7. "No judge or other officer shall take the acknowledgment" of any person unless that person is personally known to him (the certificate must state that the person is personally known) or if not known, then the identity of such person must be proven by a credible person, whose name is given in the certificate.

See *Idem.*, chap. 24, section 24.

For modification in the statute, see chap. 109, R. S. 1874.

8. A strict compliance with all these statutory requirements and formal acceptance by the municipality, or

1—*McConnel v. Reed*, 2 Scam. 371 (R. R.); *Ayres v. McConnel*, 2 Scam. 307 (R.); *Wiley et al. v. Bean et al.*, 1 Gil. 302 (R. R.); *Fell v. Young*, 63 Ill. 106 (R. R.).  
2—*Short et al v. Conlee*, 28 Ill. 219 (Af.).

acts done that amount to an implied acceptance, will vest the fee of the streets and alleys in the public.<sup>3</sup>

Important decision on the width of a street, whose width is given in figures on the plat as originally laid out and is bounded on one side by a river. *C. R. I. & P. Ry. Co. v. P.*, 222 Ill. 427 (Af.).

#### UNSUCCESSFUL ATTEMPTS TO DEDICATE UNDER THE STATUTE

Dedications that have failed on account of defective certificates of acknowledgment. Plat not made by the officer<sup>1</sup> named in the statute, or not acknowledged before officer<sup>2</sup> named in the statute, or donor<sup>3</sup> attempting to act by attorney.

In the plat of village, a square was left but there was no designation as to the purpose of the apparent donation. It was held that parol evidence in the absence of any record might be taken to ascertain, if possible the intention of the donor, and if the evidence warranted the conclusion that it was the intention to have it remain an open square, then it could not be used for the erection of a town hall or cut up into streets.

Princeville, Village of *v. Auten et al.*, 77 Ill. 325 (Af.).

Birge *v. Centralia, City of*, 218 Ill. 503 (R. R.).

3—*Canal Trustees v. Havens et al.*, 11 Ill. 554 (R. R.); *Hunter v. Middleton*, 13 Ill. 50 (Af.); *Gebhardt v. Reeves*, 75 Ill. 301 (Af.); *Manly, Uri et al. v. Gibson*, 13 Ill. 308 (R. R.). Court says: "The plat is not a necessary muniment of title."

See *Sanitary Dis. v. Adams et al.*, 179 Ill. 406 (Af.), gives history of canal litigation. *Hamilton v. C. B. & Q. R. R.*, 124 Ill. 235 (Af.). *Chicago, City of v. Drexel*, 141 Ill. 89 (Af.).

1—*Trustees et al. v. Walsh et al.*, 57 Ill. 363 (R. R.); *Thomas v. Eck-*

*ard*, 88 Ill. 593 (R. R.); *Auburn, Village of, v. Goodwin et al.*, 128 Ill. 57 (Af.); *Wilder v. Aurora Traction Co.*, 216 Ill. 493 (R. R.).

2—*Davenport Bridge Ry. Co. v. Johnson*, 188 Ill. 472 (Af.); *Birge v. Centralia, City of*, 218 Ill. 503 (Af.); *Spalding v. M. & W. Ry. Co.*, 225 Ill. 585 (R. R.).

3—*Gosselin v. Chicago, City of*, 103 Ill. 623 (R. R.); *Gould v. Howe*, 131 Ill. 490 (Af.); *Thomsen v. McCormick*, 136 Ill. 135 (Af.); *Earl v. Chicago, City of*, 136 Ill. 227 (Af.); *Clark v. McCormick*, 174 Ill. 164 (Af.).

Limited operation of plats that fail to conform to the statute.

A stranger makes a plat and afterwards the owner sells by a reference to that plat. The owner, under these circumstances is held to have adopted the plat and is bound by the reference thereon to streets and alleys. Controlling principle in a common law dedication is the *animus donandi* (1) and acceptance by public.

Smith v. Flora, Town of, 64 Ill. 93 (Af.).

Clark v. McCormick, 174 Ill. 164 (Af.).

Gridley v. Hopkins, Receiver, etc., 84 Ill. 528 (Af.).

Earll v. Chicago et al., City of, 136 Ill. 277 (Af.).

Smith v. Young, 160 Ill. 163 (R. R.).

Here the court observes: "Where ground is platted (quoting from page 173) by a person who does not have the title or whose title afterwards fails, if the real owner recognizes the plat and conveys lots according to the description therein, and abutting upon grounds designated as public, he is estopped afterwards from claiming the ground so designated, the real owner adopts the entire plat as his own, with all its dedications and reservations."

Saunders v. Chicago, City of, 212 Ill. 206 (Af.).

Here attempt to vacate a plat.

Thompson v. Maloney, 199 Ill. 276 (R. R.).

Russell v. Lincoln, City of, 200 Ill. 511 (Af.).

Godfrey v. Alton, City of, 12 Ill. 29 (Af.).

Trespass. Opinion by Caton, Judge: Leading case on the subject of common law dedication. Court says: "No particular form is required to the validity of a dedication. It is purely a question of intention."

Princeton, Town of v. Templeton et al., 71 Ill. 68 (Af.).

Here court says: "No dedication for lack of 'intention.' "

#### VACATING PLATS

Stevenson v. Lewis, 244 Ill. 147 (R. R.).

Executor of Dowee et al., Appellants. Court: "The owner is estopped to deny the existence of the dedication whenever private rights intervene." "In such case it is immaterial whether the dedication is statutory or at common law." The statute authorizing the vacation of a plat does not authorize the owner to destroy private rights.

#### LANDLORD AND TENANT—DEMAND FOR RENT

"At common law, where a lease contained a condition for re-entry for non-payment of rent, the law, not favoring forfeitures, required several things to be done by the lessor to entitle him to re-enter. It required a demand of the precise amount of the rent due, neither more nor less; that it be made upon precisely the day when due and payable by the terms of the lease. It was required to be made at a convenient hour before sunset; upon the land at a most conspicuous place; as if it was a dwell house at the front door, unless some other place was named in the lease, when it was necessary to make it at that place. If any of these requirements were not observed, the lessor could not declare a forfeiture and re-enter the premises."

Chadwick v. Parker, 44 Ill. 326 (Af.).

This rule of the common law has been changed by Statute. See Act of 1865, page 107.

See Revised Statutes of Illinois, 1874, pages 658 and 659.

Burt v. French, 70 Ill. 254 (Af.).

Under the statute not necessary to demand rent on the first day it is due, in order to lay the ground work for the enforcement of a forfeiture.

#### RIGHTS OF ASSIGNEE FROM LESSOR

At common law assignee of the reversion had no right of recovery from the tenant without attornment, for rent. *Fisher v. Deering*, 60 Ill. 114 (R. R.).

This right has been given by the statute.

See section 14, chap. 80 (R. S. Stat. of 1874).

See this statute restricted in its scope.

*Sexton v. Chicago Storage Co. et al.*, 129 Ill. 318 (R. R.).

*Barnes v. Northern Trust Company*, 169 Ill. 112 (Af.).

#### TRUSTEES—STATUTORY COMPENSATION

Trustees appointed by will may have a reasonable compensation for services. *Ses. Laws 1891*, page 216.

The principle of equity is: that trustees or any one acting in a fiduciary capacity can not deal on their own account with the subject matter of the trust; can not make profit to themselves.

*Thorp et al. v. McCullum*, 1 Gil. 614 (Af.).

*Arnold v. Alden*, 173 Ill. 229 (Af.).

*Huggins v. Rider*, 77 Ill. 360 (R. R.).

*Roseboon v. Whittaker et al.*, 132 Ill. 81 (Af.).

#### PLAINTIFF DIES BEFORE VERDICT AND JUDGMENT, IN A LAW CAUSE

At common law, if the plaintiff died before verdict and judgment, the suit abated and could not be revived. The statute (R. S. 1874, section 10, ch. 1) however provides for a revival or restoration of the suit.

*Mitchell, Exrx. v. King*, 187 Ill. 452 (Af.).

MARRIED WOMEN—RIGHTS TO REAL ESTATE AT  
COMMON LAW

Section 14 of Dower Act, changes the common law. See *Gordon v. Dickison*, 131 Ill. 141 (Af.).

“A *feme covert* cannot, except she be authorized by an express statute, convey her fee simple title to real estate by deed. She is incapable of doing so by the common law, and hence there can be no law for it, unless it is by statute. From 1845 to 1847 there was no statute in this state enabling married women without the state to convey their lands lying within.

*Lane v. Soulard et al.*, 15 Ill. 123, decree rev.

*Moulton et ux v. Hurd*, 20 Ill. 137 (R. R.).

A bill in equity was filed to reform a mortgage executed by husband and wife on land of the wife. The Supreme Court in holding that the mortgage deed could not be reformed thus observes: “At the common a *feme covert* could not, by uniting with her husband in any deed of conveyance, bar herself or her heirs of any estate of which she was seized in her own right; or of her right of dower in the real estate of the husband. The only mode in which a married woman could at common law, convey her real estate or bar her right of dower, was by uniting with her husband in levying a fine.

Acting upon the principle that the participation of the wife in the transfer of her real estate must be free and unconstrained, the courts have held that an agreement made by a *feme covert*, with the assent of her husband, to sell her real estate is absolute void at common law, and such a contract could not be enforced in equity. Such contracts are void.”

Following the *Moulton* case are:

*Hutchins et al. v. Huggins*, 59 Ill. 29 (R. R.). Held that a mortgage made in 1857 as against a married woman could not be reformed.

Oglesby Coal Co. v. Pasco et al., 79 Ill. 164 (Af.).

Follows the Hutchins case on the same point.

Exception to the rule: If a married woman has been guilty of any fraud, a court of equity will hold her estopped from setting up her coverture. See Patterson v. Lawrence, 90 Ill. 174 (Af.).

See Forsyth et al. v. Barnes, 228 Ill. 326 (R. R.), as to what acts of married women are void.

Conveyance of land in Illinois by a non-resident *feme covert*. At common law, it was a firmly established principle that a married woman was incapable of conveying her own individual lands by any ordinary "deed executed for the assurance of the title to land."

In 1847 (session laws 1847, p. 37) there was enacted: "When any *feme covert*, not residing in this state, being above the age of eighteen years, shall join with her husband in the execution of any deed, mortgage, conveyance, or other writing of, or relating to, any lands or real estate situate within this state, she should thereby be barred of, and from all estate, right, title interest, and claims of dower therein, in like manner as if she was sole, and of full of age," etc., etc.

See Revised Statutes 1874, chap. 30, section 18 (p. 275.) Lane v. Soulard et al., 15 Ill. 123 (R. R.).

Rogers v. Higgins et al., 48 Ill. 211 (Af.).

This was a bill in equity brought to enjoin a suit in ejectment. An attempt had been made to convey the land of a married woman who was a non-resident. Deed dated prior to the statute of 1847. In holding that no title passed the court says:

"It is not disputed, nor can it be, that at the time that this deed was executed and delivered, there was no statute of this state that authorized a married woman, to execute a deed for its conveyance. There is no principle of the common law more firmly estab-

lished or uniformly recognized, than that a married woman is incapable of conveying her property by any of the usual deeds executed for the assurance of title to land. Nor can she make any binding contract, unless authorized by legislative enactment. Without such authority, a deed executed by her for the conveyance of her land, or any other contract, is void, and not merely voidable."

UNDER COMMON LAW HUSBAND ENTITLED TO WIFE'S  
EARNINGS

Rose et al. v. Sanderson, 38 Ill. 247 (Af.).

Facts. Bill in equity to set aside a levy on estate of curtesy of Julius K. Rose. Husband vested with estate before the act of 1861 passed. Money came to the wife long prior to the act. Held husband's title not disturbed.

Farrell v. Patterson, 43 Ill. 52 (Af.).

MARRIED WOMEN'S ACT OF 1861

Emerson v. Clayton, 32 Ill. 493 (R. R.).

Replevin. The defendant pleaded the coverture of the plaintiff. Plaintiff replied that the property sued for was during coverture acquired in good faith from persons other than her husband, with her own money and in her own right, and such remains her sole and separate property, and under her sole control. The defendant demurred and the court sustained the demurrer. Error. In construing the statute the court observes:

"We see no other mode by which this statute can be made effectual for the purposes contemplated by the legislature, than by holding the wife, as to her separate property, to be in the condition of an unmarried woman, and capable of suing for its recovery in all courts."



AN ACT to protect married women in their separate property, February 21, 1861, Session Laws, page 143.

A deed made by a married woman, without joining her husband, of her separate property was attacked in an ejectment suit. The court in holding that a married woman can not convey her real estate acquired since the statute of 1861, without joining her husband, thus observes Lawrence Judge:

“By virtue of the marriage (quoting from page 64) the husband became owner, of the personal property held by the wife at the date of the marriage, or which came to her after that time, and was reduced by the husband to possession, and he was also seized of an estate, during coverture, in land held by the wife in fee. This estate was in the eye of the law a freehold, as it would continue during their joint lives, and was liable to be sold on execution against the husband. The personal property reduced to possession, and this estate in the wife’s lands, were at the disposal of the husband, and liable to be sold at his pleasure, for his own use, or to be levied upon and sold by his creditors. These were the evils which the law was designed to cure, and has cured.” \* \* \*

“This estate (tenant by the curtesy) is as old as the common law. It has always been recognized as existing in this state. It is not expressly abolished by the act of 1861, and, so far from being abolished by implication, it may be recognized as taking effect on the death of the wife, without conflicting in the slightest degree with the letter, spirit or object of that law. On the contrary, the law itself provides, that it is during coverture that the property of the wife is clothed with these new qualities, thus leaving the existing law unchanged, as to the disposition of the wife’s property at her death.” Quoted from page 65, leading case.

Cole v. Riper, 44 Ill. 58 (R.).

Bressler et al. v. Kent, 61 Ill. 426 (R. R.).

In Parent v. Callerand, 64 Ill. 97 (R. R.), it was held

citing Cole case that a married woman could execute a lease of her own land without joining her husband in the act. Court: "If such were not the case, citing from page 100, the provision in her behalf would be a mere barren right, fruitless of any good result."

Since the statute of 1861 the husband is still liable for the debts of the wife contracted prior to the marriage, as he is entitled to her earnings.

Conner et ux v. Berry et al., 46 Ill. 370 (Af.).  
Lawrence Judge.

McMurtry et al. v. Webster et al., 48 Ill. 123 (Af.).  
Walker Judge.

Dubois v. Jackson, 49 Ill. 49 (R. R.).

The statute of 1861 was not designed to change the relation of the husband to property that had vested in him since the marriage and prior to the statute. Replevin by wife for personal property. Judgment in favor of wife reversed.

Carpenter et al. v. Mitchell, 50 Ill. 470 (R. R.).

Husband and wife sued on a promissory note given by them for the purchase price of land sold and conveyed the wife.

Court, Lawrence J.: Question: "Under the statute of 1861 is a married woman liable to an action at law upon a promissory note given by her in the purchase of land or other property."

In holding that she is not the court observes:

"We will further add, that in our opinion, all remedies against married women upon contracts, even if they relate to their separate property, should be sought on the equity side of the court where such kind and degree of remedy may be given as the nature of each case and the equities of the parties may

require, and where jurisdiction over the property rights of married women has ever resided."

Notes given prior to 1869.

**Carpenter v. Mitchell**, 54 Ill. 126 (Af.).

Walker, Judge.

Facts: Suit in equity, same case as is, 50 Ill. 470, to enforce a vendor's lien for the part purchase price of the land—the notes stated that they were for purchase money. The married woman set up as a defense in her answer coverture and offered to rescind and re-convey subject to money already paid. In holding her liable, the court observes:

"This provision (First section of the Act of 1861) contemplates the acquisition of property in different modes by married woman, and a fair interpretation of the language employed embraces a purchase by her. If then (quoting from page 132) the statute authorizes a married woman to purchase real estate, she must, when she exercises such a power, do it on the same terms and conditions which attach to others not under disability, so far as to be bound by her purchase, and to render her separate property, in equity, liable to discharge indebtedness thus incurred."

A married woman was injured by a railroad company. It was held citing the Emerson case, 32 Ill. 492, that the right of action was in her.

**Ch., B. & Q. R. Co.**, 52 Ill. 260 (R. R.).

Husband as agent for wife may settle a damage suit, the wife being cognizant of the act of the husband.

Statutes of 1861 and 1869, costs.

Wife sued husband for separate maintenance.

Court: "She (wife) may own separate property and have and enjoy her earnings, and no reason is

perceived why she should not, out of them, bear the burdens of her unsuccessful litigation, whether with her husband or with other persons. The extension of rights usually imposes corresponding liabilities.”  
**Musgrave v. Musgrave** (leading case), 54 Ill. 186 (Af.).

Common law rule (husband liable for wife's debt contracted before marriage changed by legislature.)

**Howarth v. Warmser**, 58 Ill. 48 (R. R.).

Facts: Margaret Schick, being a *feme sole*, contracted a debt October 20, 1869. In 1870 she married James Howarth. Subsequently a judgment was rendered against both for the balance remaining unpaid on the original debt.

Court, Lawrence, Judge: “Since those decisions (46 Ill. 370 and 48 Ill. 123) were made, the legislature by the act of 1869 has taken from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common law rule rested. The rule itself must now cease. Legislative action has virtually abolished it, by taking away its foundations and rendering its enforcement unjust.”

**Cookson v. Mary Toole** (leading case), 59 Ill. 515 (R. R.).

Assumpsit for work and labor performed for a married woman in and about the improvement and cultivation of her farm.

Court: “The question presented is, whether a married woman, holding property under the act of 1861 can bind herself at law, for work and labor performed in respect to property so held, and is one which has not, heretofore been directly presented to this court.”

“In the absence of any statutory provision the separate estate of a married woman is the mere creature of equity. Having recognized her separate es-

tate, courts of equity were constrained, by the logic of the position to regard her as clothed with a qualified capacity by implication, and in some instances even beyond the capacity conferred by the instrument of settlement to deal with respect to such separate property as a *feme sole*."

McAllister, J., traces out the origin of the rule and says that the concluding observations (*Mitchell v. Carpenter*, 50 Ill. 470) in regard to equity being the proper forum in which to assert a married woman's rights are dicta.

Court: "In the case at bar, the separate estate, as is alleged in the replication, was derived from persons other than defendant's husband; it consisted of a farm under cultivation, with implements and stock, subject to her sole control and managed for her sole use and benefit. The measure of her right to hold, own, possess and enjoy this property, is that which an unmarried woman would have. This right must, by necessary implication, carry with it all the incidents to such a degree of enjoyment of property, and one of those incidents is a legal capacity to contract for servants and laborers."

Following this case are:

*Halley v. Eliza Ball*, 66 Ill. 250 (R. R.).

*Haight (Harriet M.) v. McVeagh et al.*, 69 Ill. 624 (Af.).

Personal property bought by wife.

*Margaret and John Martin v. Robson*, 65 Ill. 129 (R. R.).

Leading case, Thornton, Judge.

Judgment of \$1,400 against man and wife for slanderous words spoken by the wife. Appeal by defendants.

Court: "Since the passage of the acts of 1861 and 1869 (Session Laws of 1861, 143, and 1869, 255) is the husband liable for the torts of the wife during  
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coverture, committed when he was not present, and in which he in no manner participated?

Court: "At common law he (husband) had control, almost absolute, over her person; was entitled, as the result of the marriage, to her services, and consequently to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession, during her life; could collect and enjoy the rents and profits of her real estate; and thus had dominion over her property, and became the arbiter of her future.

"She was in a condition of complete dependence; could not contract in her own name; was bound to obey him; and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law.

"As a necessary consequence, he was liable for the debts of the wife *dum sola*, and for her torts and frauds committed during coverture. If they were done in his presence, or by his procurement, he alone was liable; otherwise they must be jointly sued." Quoted from page 131.

"While they (statutes) do not expressly repeal the common law rule,—that the husband is liable for the torts of the wife,—they have made such modifications of his rights and her disabilities, as wholly to remove the reason for the liability." Quoted from page 132.

"The inquiry is therefore pertinent, what is left of the nuptial contract?

"As the result of the marriage vow, and as part of the contract, the wife is still bound to love and cherish the husband, and to obey him in all reasonable demands not inconsistent with the exercise of her legal rights; to treat him with respect, and regard him at least as her equal; and he is still bound to protect and maintain her, unless she neglect wholly her marital duties as imposed by the common law,

or assume a position to prevent their performance, and thus deprive him of her society, mar the beauty of married life and disregard the household good." Quoted from page 133.

To the mercenary argument of counsel, that at common law the obligation was imposed upon the husband whether the wife was poor or wealthy, the court replies: "If she did not enrich him with property—if she did not endow him with gold—she endowed him with a nobler gift and a greater excellence. She enriched him with her society, advised and encouraged him as one who had no separate interests, and freely gave to him her time, industry and skill. As a means of paying her debts and damages for her torts, her counsel and earnings might be as important as her accumulated property." Ending on page 136.

"The common law was never guilty of the absurdity of imposing obligations so onerous without conferring corresponding rights. Hence, besides the rights of property, the legal pre-eminence was exclusively vested in the husband. He was answerable for her misbehavior and hence had the right of restraint over her person.

"Lord Kaimes, in his Sketches, says: 'The man bears rule over his wife's person and conduct; she bears rule over his inclinations; he governs by law, she by persuasion.'" Quoted from page 137.

Conclusion: "The chains of the past have been broken by the progression of the present, and she may now enter upon the stern conflicts of life untrammelled. She no longer clings to and depends upon man, but has the legal right and aspires to battle with him in the contests of the forum; to outvie him in the healing art; to climb with him the steps of fame, and to share with him in every occupation. Her brain and hands and tongue are her own,

and she should alone be responsible for slanders uttered by herself.

"Our opinion is, that the necessary operation of the statutes is to discharge the husband from his liability for the torts of the wife, during coverture, which he neither aided, advised nor countenanced." Quoted from page 139.

Reeves v. Webster, 71 Ill. 307 (R. R.).

Replevin by a married woman. In holding that the case was not made out, the court observes:

"The act of 1861 was not designed to overcome the presumption of the common law in that respect. The plaintiff, in order to claim the benefit of the act of 1861 was bound to bring her case by the evidence within its provisions. She acquired the property during coverture, and will be protected under the act if she acquired it, in good faith, from any person other than her husband. This was an affirmative fact for her to establish.

"The law required her to show, that the money or property that went to pay for the property in question was her own separate property, acquired in good faith from some person other than her husband."

Harrer et al. v. Wallner, 80 Ill. 197 (Af.).

A deed executed by a married woman under eighteen years of age is void and she is not required on coming of age to take any steps to avoid the same.

Marriage and conveyance of land to husband and wife occurred in 1852.

Since the statute of 1861 the statute runs against a married woman, the same as against a *feme sole*.

Castner et al. v. Walrod, 83 Ill. 171 (Af.). Modifies the holdings in Morrison v. Norman, 47 Ill. 477 (Af.), and Noble v. McFarland, 51 Ill. 226 (Af.).



**Facts:** A married woman was sued upon a note dated April 2, 1873. The note was assigned to Samuel Thompson, who brought suit. The woman pleaded coverture. The plaintiff replied that the note was given for or in payment of certain lands sold and conveyed. A demurrer to the replication was sustained. Plaintiff appealed.

The court after (Dickey, Judge) reviewing the authorities conclude: "In every case the question has been, was the contract within the scope of the necessary implications of the statute? Each case must in a measure depend upon its own circumstances, and each must be tested by the rule that the contract is not binding unless the capacity to make it is conferred by statute, expressly, or by its necessary implication. We find but one case directly in point (Carpenter v. Mitchell) and it was there held that a contract for the payment of the purchase money of land, conveyed to a married woman, did not bind her personalty." Cited from page 202, 85 Ill.

Thompson v. Weller (Mary E.), 85 Ill. 197 (Af.).

#### RULE WHEN PROPERTY IS GIVEN DIRECT FROM HUSBAND TO WIFE

The earnings of a married woman belong to her husband.

Rose et al. v. Sanderson (Lawrence, J.), 38 Ill. 247 (Af.).

Bill in chancery to set aside a levy on life estate of husband in certain land the fee of which was in the wife.

Court: "If it was the intention of the legislature, in the clause of the (first clause of Act of 1861) act under consideration, to take from the husband a life estate, which had vested at the passage of the law,

and give it to the wife such intention was beyond their power of accomplishment."

**Brownell v. Dixon, 37 Ill. 197 (Af.).**

**Facts:** Replevin. A brother-in-law of the husband had given to the wife notes to the amount of \$4,000. The points were made against the instruction. Which was as follows:

that if Gray bought the billiard table in question without any special understanding or agreement with his wife, Mrs. Gray, that the same should be done in her name, then they became the property of B. W. Gray as far as creditors were concerned, and were liable to execution, etc.

Court sustains the instruction and says: "We do not understand this instruction as countenancing the idea that a married woman may not employ an agent to transact her business, and that she may employ her husband to act. The wife must be careful to see that the husband is acting, in truth and in fact, as her agent and not on her own account. Very slight circumstances may, in certain cases, be sufficient for a jury to infer that the property he is managing, is really his own and not that of the wife—that she left it at his own disposal, abandon his own control over it and bestowing it upon him. This she may do, and a jury will not require much persuasion in a proper case, to induce them to come to such a conclusion. This instruction left the jury to determine, from the whole evidence, whether the money of Mrs. Gray was, or not, given to her husband for his purpose, or to be invested for the benefit of his wife." Decision in favor of sheriff.

**Elijah v. Taylor, 37 Ill. 247 (Af.).**

**Facts:** Wife owned the land; husband occupied it and planted corn thereon; during the summer the

husband went to the army and the wife was left in charge of the corn and sold the same in the field to one Elijah at 20 cents a bushel, estimating that there would be 400 bushels, and agreeing to pay at that rate for any surplus. Wife went on a journey, leaving Elijah to gather the corn; he paid her for 425 bushels, she insisting that there was a larger quantity. Husband returned from the army, sued for the alleged surplus, and obtained a judgment for \$53.

Court: "It is insisted, as a ground for reversal, that the act of 1861 made the wife sole owner of the corn because it was raised upon her land, and that the husband had no legal interest in it.

We desire to proceed cautiously in the construction of that act, because, although passed without much consideration, it involves interests of great magnitude, and questions of no little difficulty. And all we deem it necessary to say:

That where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it with her consent for the common benefit of the family and the products of his toil upon such land is as much his property, notwithstanding the act of 1861, as if he had occupied as a tenant land rented from some third person. Any other rule would plainly lead to great confusion and open a wide door to fraud. In the case at bar the corn was planted and at least partially raised by the husband and must be regarded as his property." Lawrence, Judge.

Wortman v. Price, 47 Ill. 22 (R. R.).

Facts: Mrs. Price claimed ownership in 70 hogs levied on under execution against her husband. Mrs. Price swore: that her husband's father gave her in 1866 \$2,960.00 and a piece of land which she sold for \$800.00; that her husband had been acting as her

agent buying and shipping stock with this money. The partner of Price swore that he and Mr. Price formed a partnership in dealing in grain and stock in 1866; that he knew nothing of Mrs. Price in the business and was not in partnership with her; that the firm did business to the amount of \$4,000 or \$5,000 a week; made money; did not know where the money came from that Price put into the business; partnership had been dissolved and the hogs levied upon sold to Price. Case submitted without a jury.

Court: "We think the finding was erroneous (court below decided in favor of the wife's title). Under the law (Act of 1861) the husband can undoubtedly act as the agent of his wife, for the purpose of managing her separate property, but it must be an actual and bona fide agency, and not an arrangement by which under color of an agency kept concealed from the public the husband is to enter into trade with capital furnished by the wife, carry on business in his own name, precisely as he would do with his own money, and then claim, as against his creditors, that all property bought and sold by him in the course of his business, is the property of his wife. In the case before us there does not seem to have been any arrangement between husband and wife for his compensation, although he devoted all his time and energy to the business which he claims to have been conducting as her agent. The profits of this business arose in part from the capital employed, and in part from his time and skill, yet there was no arrangement as to their division. Although the act of 1861 authorizes the wife to hold personal property, and under that law she may employ her husband as agent to manage it, yet it does not authorize her to receive, to the exclusion of creditors,

the entire fruits of his time, skill and industry, and it must not be so construed as to invite to fraud.

The transaction can only be regarded, so far as concerns creditors as a loan of the wife's money to her husband, by means of which he engaged in trade. Such would have been the character if the money had come from a third person, and it must be so regarded as between the husband and wife. It has been decided in other states having a married woman's law, similar in most respects to our own, that the wife cannot by virtue of this law engage in trade.

Freeman v. Aeser, 5 Duer 476.

Sherman v. Elder, 24 N. Y. 383.

Wooster v. Northrup, 5 Wis. 245.

Glover v. Alcott, 11 Mich. 471.

Gage v. Dauchy, 28 Barb. 622.

Keeney v. Good, 21 Penn. St. Rep. 349.

Hallowell v. Horter, 35 Ib. 375.

A different rule would lead to gross fraud. What was said in Brownell v. Dixon, 37 Ill. 197, in regard to the power of the husband to act as agent for his wife simply means that he may act as her agent for a particular transaction, or generally, for the control of her property or the investment of her funds.

We did not say nor meant to be understood as saying that she could make him her agent for the purpose of engaging in trade, to be managed by him, and to which all his time and energy might be devoted, and the property be beyond the reach of creditors."

Sweeney et al. v. Damron et al., 47 Ill. 450 (R. R.).

Here land standing in the name of the wife was attacked in equity under a judgment against the wife. Exceptions were sustained to the answer of the hus-

band and wife and a writ of error was sued out to review that holding.

In reversing the court observes: "The mere fact that the husband was indebted to them on the date of these judgments, does not render the previous conveyance of the lots by McCreery to Mrs. Sweeney void for fraud, and this would seem to be the scope of the bill." Decree reversed with leave to complainants to amend their bill—defendants to have leave to answer, as advised.

In commenting upon the above case in *Pike v. Baker* (replevin by wife for horse levied upon by a constable under an execution against the husband, wife's title sustained) the court says: "It was there inadvertently said, it has always been held that a contract entered into by husband and wife, whether executed or unexecuted, was valid and binding. This is not the rule, as all contracts entered into between husband and wife, whether executed or unexecuted, are held to be void. What should have been said in that case is that all gifts of or settlements made upon the wife through the intervention of a trustee or when conveyed to her by a third party, although the property was paid for by the husband, he not being in debt, and the transaction being made in good faith, have always been upheld. This is the extent to which voluntary settlements or gifts by the wife to the husband have been carried and the rule must be thus limited.—Quoted from page 167, *Pike v. Baker*, 53 Ill. 163 (Af.).

**Hoker v. Boggs**, 63 Ill. 161 (R. R.).

Facts: Peter Hoker executed a note to Mary A. Hoker, his wife, who endorsed it to James W. Boggs. Judgment on the note; appeal by Peter Hoker. Held that the endorsement of the husband was necessary to vest any title in the assignee.

Court: "The note in the case at bar was a voluntary gift by the husband to the wife, and the court said in *Pike v. Baker*, 53 Ill. 163, that all contracts executed or unexecuted between husband and wife are void. No aid can be derived from the statute for it only authorizes women to acquire property from other persons than their husbands."

*C. & J. Conkling v. Caroline Doul et al.*, 67 Ill. 355 (Af.).

Facts: Bill in equity by plaintiffs in error. Bill sought to have a grocery bill furnished to the wife while she was carrying on a restaurant in her own name with her husband's consent charged upon her separate estate.

Court: "It is alleged that the business of keeping a restaurant was carried on by means derived from the wife's own earnings, but it is not alleged that these earnings were since the act of 1869 went into force, giving such earnings to the wife."

"In the absence of an estate created through the intervention of trustees, or derived from persons other than the husband, so as to bring it within the act of 1861, the rights of husband and wife here are precisely as at common law. If he consents that she may hold personal property and carry on business in her own name, or receive the rents and profits of her land, and that is all the record shows, still, if that consent is not based upon a sufficient consideration it may at any time be withdrawn and his right at common law asserted."

"If the alleged separate estate was derived from persons other than the husband, so as to bring it within the act of 1861, then if by the manner of becoming invested it would have been a legal estate in a feme sole, it would likewise be such in *Mrs. Doul*, in that case she would be clothed with a legal capacity by implication of the statute to enter into con-

tracts in respect to such separate estate which would be cognizable by courts of law. *Cookson v. Toole*, 59 Ill. 515."

Bill in equity to set aside a deed made by the complainant—a married woman.

*Brooks v. Catharine Kearns*, 86 Ill. 547 (Af.).

Facts: In 1866 the wife (complainant) made a deed to her husband for the property in controversy. In holding this deed void the court observes: "It was only by the enabling laws that a married woman could convey her real property, and the statute then in force made it imperative to do so, she must join with her husband in executing the deed. Of course that could not be done in a conveyance directly to her husband, as this deed was. Our understanding is, a deed of a married woman void at law will not be enforced against her in equity. This principle has frequently been declared in the decisions of this court. *Rogers v. Higgins*, 48 Ill. 211.

The jurisdiction of the court was sustained on the principle of *Reed v. Tyler*, 56 Ill. 288.

#### CONTRACTS BETWEEN HUSBAND AND WIFE

"Contracts may be made and liabilities incurred by a wife and the same enforced against her to the same extent and in the same manner as if she was unmarried; but with the consent of her husband she may not carry on any partnership business, unless her husband has abandoned or deserted her."

Section 6, Chap. 68, R. S. 1874.

See Session Laws 1861, page 143.

See Session Laws 1869, page 255.

*Hamilton v. Hamilton*, 89 Ill. 349 (Af.).

*Thomas v. Mueller*, 106 Ill. 36 (Af.).



Snell v. Snell, 123 Ill. 403 (R. R.).  
 Crum v. Sawyer et al., 132 Ill. 443 (R. & A.).  
 Heisen v. Heisen et al., 145 Ill. 658 (Af.).

Here it is said that the husband's right to dower in his wife's lands "is not an estate in the lands, but a right of action to demand assignment of dower." What was said in Crum v. Sawyer on this point was inadvertently said and is inaccurate.

Luttrell v. Boggs et al., 168 Ill. 361 (Af.).  
 Heiser v. Sutter, 195 Ill. 378 (Af.).  
 Carling v. Peebles, 215 Ill. 96 (R. R.).

Here a wife gave a receipt for \$600 in part for her dower interest in land. After death of husband she claimed dower. Held, barred *pro tanto*.

#### SUCCESSFUL ATTACK UPON THE CONTRACTS OF MARRIED WOMEN

Following Brownell v. Dixon, 37 Ill. 241, are the cases which hold adversely to the establishment of the property rights of married women.

Wilson v. Loomis, 55 Ill. 352 (R. R.).  
 Hay v. Hayes, 56 Ill. 342 (Af.).  
 Nelson et al. v. Smith, 64 Ill. 394 (R. R.).  
 Patton v. Gates, 67 Ill. 164 (R. R.).  
 Hockett et al. v. Bailey, 86 Ill. 74 (Af.).  
 Robinson et al. v. Brems et al., 90 Ill. 351 (Af.).  
 Tomlinson et al. v. Mathews et al., 98 Ill. 178 (R. R.).  
 Lachman et al. v. Martin, 139 Ill. 450 (R. R.).  
 Murphy v. Nilles, 166 Ill. 99 (Af.).

Unsuccessful attack upon contracts of married women.

Dean v. Bailey, 50 Ill. 481 (R. R.).  
 Patten v. Patten, 75 Ill. 446 (R. R.).  
 Bongard v. Cone, 82 Ill. 19 (R. R.).

Whitford et al. v. Daggett, 84 Ill. 144 (Af.).

Murphy v. Williamson, 85 Ill. 149 (Af.).

Van Dorn v. Leeper, 95 Ill. 35 (Af.).

Tyberandt v. Raucke, 96 Ill. 71 (R. R.).

Mali v. Spencer, 186 Ill. 363 (Af.).

Alsdurf v. Williams et al., 196 Ill. 244 (Af.).

For contract of a married woman void as against Public Policy. See Hamilton v. Id., 89 Ill. 349 (Af.).

Newman et al. v. Willetts, 48 Ill. 534 (R. R.).

Facts: Bill in equity to set aside a deed from husband to wife.

Court: "A deed from husband to wife during coverture made when this deed purports to have been made (the 4th of Sept., 1857) could vest no title in the wife. They were incapable, at that date of making contracts of this nature between themselves."

Conveyance of land in Illinois by a non-resident *feme covert*. At common law, it was a firmly established principle that a married woman was incapable of conveying her own individual lands by any ordinary "deed executed for the assurance of the title to land."

In 1847 (Session Laws 1847, p. 37) there was enacted:

"When any *feme covert*, not residing in this state, being above the age of eighteen years, shall join with her husband in the execution of any deed, mortgage, conveyance, or other writing of, or relating to, any lands or real estate situate within this state, she should thereby be barred of, and from all estate, right, title interest, and claims of dower therein, in like manner as if she was sole, and of full of age," etc., etc.

See Revised Statutes 1874, Chap. 30, Section 18 (p. 275).

Lane v. Soulard et al., 15 Ill. 123 (R. R.).

Rogers v. Higgins et al., 48 Ill. 211 (Af.).

This was a bill in equity brought to enjoin a suit in ejectment. The land had been. Better said: an attempt had been made to convey the land of a married woman who was a non-resident. Deed dated prior to the statute of 1847. In holding that no title passed the court says:

“It is not disputed, nor can it be, that at the time that this deed was executed and delivered there was no statute of this state that authorized a married woman to execute a deed for its conveyance. There is no principle of the common law more firmly established or uniformly recognized, than that a married woman is incapable of conveying her property by any of the usual deeds executed for the assurance of title to land. Nor can she make any binding contract, unless authorized by legislative enactment. Without such authority a deed executed by her for the conveyance of her land or any other contract is void and not merely voidable.”

#### HUSBAND'S RIGHTS IN LAND AND PERSONALTY OF HIS DECEASED WIFE WHO DIES CHILDLESS AND INTTESTATE

At common law personal property not reduced to the possession of the husband in the lifetime of the wife went to the next of kin of the wife. The husband was not next of kin of his wife. *Townsend v. Radcliffe*, 44 Ill. 446.

Statutory provision (first) for husband when the wife died childless and was seised in fee of real estate at her death.

Statute: Sec. 2. “That when any *feme covert* shall die intestate, leaving no child or children or descendants of a child or children, then the one-half of the real estate of the decedent shall descend and go to her husband as his exclusive estate for ever.”

Session Laws 1842-3, page 319.

Statute of Jan. 23rd, 1829, gave the widow when there were no children one-half the real estate.

See *Lockwood v. Moffett*, 177 Ill. 49 (Af.).

### PERSONAL PROPERTY OF WIFE

Husband surviving and no children after payment of all just debts the whole of the personal estate shall descend to the surviving husband.

Chap. 39, Section One, Third Paragraph, Descent.

### POWER OF EQUITY SINCE 1874 TO REFORM DEED OF MARRIED WOMAN

*Snell et al. v. Snell et al.*, 123 Ill. 403 (R. R.).

Facts: Husband and wife execute a mortgage in 1881. Mistake made in the description of the land. After death of the husband the mortgagee files a bill to correct the mortgage and for foreclosure. The description was corrected so as to cover homestead premises and thereafter the widow filed a bill in equity claiming homestead in the premises. Prayer of bill granted. In reversing the court observes, speaking of the law prior to the reform legislation in favor of married women: "Their contracts by the common law as it existed in England and in this state prior to 1861, were absolutely void at law, and were equally so in equity, so far as imposing any personal obligation is concerned. They might, however, by such contracts, subject to certain limitations, bind their separate estates, but they imposed no personal obligation whatever. The right of a married woman to have a separate estate in personal property was purely a creature of equity, and the power to bind it (estate, not herself) by a contract fairly entered into in respect to the estate, and on her own account, was regarded as a mere inci-

dent of such ownership. As her contract imposed no personal obligation, either at law or in equity, it therefore followed as a logical result and legal sequence that a bill would not lie to reform a contract or conveyance alleged to have been made by a married woman. While at common law a married woman could not convey her own real estate or release her inchoate right of dower or other interest in the lands of her husband, yet she might, through the instrumentality of a fictitious suit, called a *fine* or *fine and recovery*, permit another to recover whatever right she had in the land proposed to be conveyed, and thus, by a species of estoppel, bar her right. At common law this was the only mode by which a married woman could dispose of her own lands, or any interest she might have in those of her husband. This cumbersome and expensive mode of conveying her interest in real property was abolished by an act of the British Parliament (3-4 William 4, Chap. 74)——

As to her the deed only operated as a conveyance; therefore, all contained in it were, in law, the covenants of the husband only.

Held under the acts—1861, 1869 and 1874, the widow was bound by the decree that corrected the mortgage executed by her and her husband.

#### NATURE AND ORIGIN OF THE WIDOW'S AWARD

An examination of the revised statutes of 1845, (Section 48, Chapter 109, page 546, and Section 33, page 306, Chapter 57) wherein is the first reference to this matter of a widow's award, will reveal the fact that the legislature intended to prevent creditors from taking as against the widow substantially the same personal property, which her husband had the statutory right to hold

as exempt. Thereafter, we find the court saying that it is the *statute*, that vests it in the widow, and no act of hers, judge or appraisers, is necessary to effectuate the title; and appraisement is only necessary to draw the line between what the creditors can take, and what is sacred to the widow.

In 1851 (Ses. Laws, page 25) a statute was passed giving to the husband, same to continue to widow after his decease, a \$1,000 exemption in real estate. And the courts say the same with reference to this: It is an estate given by the statute carved out of the fee and *value*, not *time*, as at common law, measures the quantity of interest, and husband and wife have nothing to do in order to effectuate their title to this.

The statute is to be liberally construed in the interest of the widow; the amount allowed, though in a certain sense fixed by the statute, is designed to vary with the size of the estate, and the condition in life of the widow, and the circumstances in which she lived, and was supported by her husband. Section 74, Chap. 3, R. S. 1874.

Cruse v. id., 21 Ill. 46 (Af.).

York, Adm'rs v. id., 38 Ill. 522 (R. R.).

Strawn et al. v. id., 53 Ill. 263 (Af.).

Phelps v. id., 72 Ill. 545 (R. R.).

Miller v. id., 82 Ill. 467.

Pavlicek exr. v. Roessler, 222 Ill. 83 (R.).

## CHAPTER XXVII

### WORKMEN'S COMPENSATION ACT

The Workmen's Compensation Act first passed in 1911,<sup>1</sup> re-enacted in 1913<sup>2</sup> is analogous to the statute of mechanic liens, for it is designed to enable the employee to fasten the pecuniary loss to him of all "accidental injuries sustained," "arising out of and in the course of the employment," upon the particular "occupation, enterprise, or business"<sup>3</sup> of which the employee is a necessary part. The right of the employee to recover under this statute is still subject to investigation<sup>4</sup> as in an action on the case<sup>5</sup> but the amount<sup>6</sup> to be recovered, which, if left to the finding of a common law jury would be uncertain and doubtful, is by the statute made certain.<sup>7</sup> With some modifications, the statute is taken from the Act of Great Britain, and though in derogation of the common law, the court in its interpretation will only observe the rules of liberal and strict construction so far as they may aid in discovering the intention of the legislature.<sup>8</sup>

1—Session Laws, 1911, p. 315.

2—Idem, 1913, p. 335.

3—Idem, 1911, p. 315, Sec. 1; Idem, 1913, p. 338, Sec. 1; Goelitz Co. v. Industrial Board, 278 Ill. 164; Keeran, Adm. v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413.

4—Investigation, Secs. 16 and 19, Law of 1917, pp. 499-500 and Secs. 17 and 18, Law of 1913, p. 347.

5—Investigation, Secs. 16 and 19,

Law of 1917, pp. 499-500 and Secs. 17 and 18, Law of 1913, p. 347.

6—Amount of compensation, Secs. 7-9, Laws 1915, p. 401.

7—Decatur Railway and Light Co. v. Industrial Board, 276 Ill. 472.

8—Armour & Co. v. Industrial Board, 275 Ill. 378.

The construction placed by the New York court upon its statute is not adopted by the Supreme Court

In determining the right of the appellate court, under section 10, Act of 1911 to review, the record of the industrial board, that had come to it through the circuit court, it became necessary for the supreme court to determine the extent to which the act changed the existing law of master and servant. And it was held that the act provided a new method of adjusting controversies between employee and employer, in reference to claims for damages of the former against the latter. A new statutory method is created if the parties choose to adopt it, for enforcing pre-existing rights of the employee.<sup>9</sup> In the absence of election by the parties, the law remains unchanged with the exception that in certain occupations, enterprises or business enumerated in section 3, Act of 1913, which are therein termed "extra-hazardous" the defenses of contributory negligence, assumed risk and the effect of the negligence of a fellow servant, which were established by the courts, have been abolished by the legislature.<sup>10</sup>

The Workmen's Compensation Act was designed to cover the whole field of liability of the master for injuries sustained by a servant.<sup>11</sup>

#### INDUSTRIAL BOARD

Section 13 of the Act of 1913,<sup>12</sup> as finally amended in 1917, provides that the industrial board shall consist of five members to be appointed by the governor, two to be representative citizens of the employing class operating

of Illinois. *Pekin Cooperage Co. v. Industrial Board*, 277 Ill. 53.

Section 24 of the Act of Illinois pertaining to notice was taken from Sec. 2, Par. 1, British Compensation Act, and the supreme court follows the construction the English courts have placed upon it. *Sub. Ice Co. v. Industrial Board*, 274 Ill. 630.

9—*Lavin, Adm., Defendant in Error v. Wells Bros. Co.*, 272 Ill. 609 (R. R.); *Christensen v. Bartelmann Co.*, 273 Ill. 346 (R. R.).

10—*Deibefkiss v. Link-Belt Co.*, 261 Ill. 454 (Af.).

11—*Matthiessen & Hegeler Zinc Co. v. Board*, 284 Ill. 378 (Af.).

12—*Session Laws*, 1911, p. 315.



under the act; two to be representative citizens of the class of employees. A chairman is likewise to be appointed, who is not identified with either class. The term of office to be six years; not more than three members to be of the same political party and the appointment of all subject to the approval of the State Senate.

Each one of the members of the board receives a salary of \$5,000 per year. To assist in the performance of the duties imposed by the statute, provision is made for the appointment of a secretary, together with such clerical help and assistants as necessary. Members of the board and arbitrators appointed by the board shall be reimbursed for actual traveling expenses and disbursements incurred in the discharge of their duties.

All the orders, awards, and proceedings shall be authenticated<sup>13</sup> (Sess. Laws 1913, p. 346; Sess. Laws 1915, p. 406; and Sess. Laws 1917, p. 498), by a seal which shall have inscribed upon it the name of the board and the words: "Illinois Seal."

#### DUTIES OF THE BOARD

The statute provides that the board shall "make rules and orders for carrying out the duties imposed upon it by law, which rules and orders shall be deemed *prima facie* reasonable and valid."<sup>14</sup>

The statute provides that the "process and procedure" shall be "simple and summary as reasonably may be."

The board has the like power, as the circuit court by its clerk, to issue a *dedimus potestatem*, administer oaths, subpoena witnesses, and compel the attendance of witnesses and the production of books and papers that relate to any "question in dispute" by attachment

<sup>13</sup>—Session Laws, 1911, p. 315.

<sup>14</sup>—Sec. 16, Sess. Laws, 1917, p. 499.

proceedings instituted in the county court of the county in which a "hearing or matter is pending, on application of any member of the board or any arbitrator designated by the board."

The board appoints a stenographer "to take the testimony and the record of the proceedings at hearings before an arbitrator, committee of arbitration, or the board."

Transcripts of the testimony or proceedings to be furnished any applicant upon the payment of 5 cents per 100 words for an original, and 3 cents for a copy.

The board has power to fix the reasonableness of any fee or charge performed by any person under the provisions of the act.

Here is created a tribunal, a *quasi* court analogous to a common law jury, in that it has power to make findings of fact, that are not subject to review; with functions, too, analogous to a chancellor's on the equity side of the circuit court, in possessing power to appoint an arbitrator, or committee of arbitration to take evidence under oath and make report to the industrial board, with the further power to re-refer<sup>15</sup> the matter on which the report is made, hear further evidence, make a different finding of the fact, confirm or over-rule the report of the arbitrators.

#### PRACTICE BEFORE ARBITRATORS

With reference to the practice before the arbitrators or committee of arbitration, the introduction of proof and raising points of law, the supreme court in *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, says: "Under the provisions of the Workmen's Compensation Act the hearing is had and the evidence taken before an arbi-

15—*Kerens-Donnewald Coal Co.*  
*v. Industrial Board*, 277 Ill. 35  
(Af.).

trator or committee of arbitration appointed as provided by that act. The finding of the arbitrator or committee of arbitration can be reviewed by the industrial board. The arbitrator, committee of arbitration and industrial board are administrative bodies and have no judicial functions. The act provides that the circuit court of the county where any of the party defendants may be found shall by writ of *certiorari* to the industrial board have power to review all questions of law presented by the record of the industrial board. It is upon this review that questions of law may be presented and determined for the first time, and any question of law is subject to determination that is presented by the record of the industrial board. It is not necessary, in order to secure such determination in the circuit court, that there be a positive record or recital that such questions were presented to the arbitrators or the industrial board for their determination. If the record itself presents any question of law the parties are entitled to have it determined by the circuit court. Whether or not the Workmen's Compensation Act, or any section of the same which it is claimed brings the case within its terms, is constitutional is a question of law presented by any record of the industrial board containing a decision awarding compensation. While this is wholly a statutory proceeding and is covered by the provisions of the act, the ordinary rules of practice and procedure will be followed upon a review of the judgment of the circuit court where they do not conflict with the express provisions of the act. It is a well settled rule that a constitutional question cannot be presented in this court for review unless it was presented to the lower court for its determination. This rule applies in cases of this kind. The record of the circuit court must disclose in some manner that such a question was presented to it for its determination before it can be raised in this court. There is nothing to indicate in any way that this question was

presented to the circuit court for determination and it cannot be raised here for the first time."

#### NO PLEADINGS

The scope of the inquiry of the industrial board is not limited by any written pleadings, as is the circuit court on both its law and equity side, but it can sweep over a field limited only by answer to the question: "Is there before the board an employee who has sustained accidental injury, arising out of and in the course of employment?" If the board has before it *competent*<sup>16</sup> evidence that tends to support a finding of fact in the affirmative, such findings, "shall in the absence of fraud, be conclusive."<sup>17</sup> No fault or negligence on the part of employer or employee, great or small, can disturb the balance between them. It is the injury "arising out of and in the course of the employment"<sup>18</sup> that creates the liability.

The supreme court can review questions of law: See 278, p. 523 (R. R.).

#### BURDEN OF PROOF AND COMPETENCY OF EVIDENCE

In testing the validity of the industrial board's record, the circuit and supreme courts will observe the same

16—*Armour & Co. v. Industrial Board*, 273 Ill. 590 (Af.); *Victor Chemical Works v. Industrial Board*, 274 Ill. 11 (Af.); *Munn v. Industrial Board*, 274 Ill. 70 (Af.); *Chicago & Alton R. R. v. Industrial Board*, 274 Ill. 276 (Af.); *Chicago Dry Kiln Co. v. Industrial Board*, 276 Ill. 556 (Af.); *Ohio Building Safety Vault Co. v. Industrial Board*, 277 Ill. 96 (Af.).

See *Spiegel's House Furnishing*

*Co. Plaintiff in Error v. Ind. Com.*, 288 Ill. 422 (R. R.), where the *Armour* case 273 Ill. 590 is overruled so far as it holds that a coroner's verdict is admissible in evidence on a hearing before the board.

17—Sec. 19 (f), *Sess. Laws*, 1917, p. 410.

18—*Decatur Railway & Light Co. v. Industrial Board*, 276 Ill. 472 (Af.).

rules as to burden of proof and competence of proof offered, as is done in an action on the case.<sup>19</sup>

In *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, the decision and award of the board was confirmed, the supreme court in reversing and remanding because there was no evidence tending to show that the injury arose out of and in the course of the employment, use this language:

"Not only does the burden rest upon the claimant to show that the injury arose out of and in the course of his employment, but he must show this by direct and positive evidence. The proof must be based upon something more than mere guess, conjecture, or surmise. \* \* \* There is no proof in this record which fairly tends to show that the death of Warlich resulted from an accidental injury received, arising out of and in the course of his employment."

#### REVIEW OF THE DECISION OF THE ARBITRATOR—STATUTORY PROVISION THEREFOR

Within fifteen days of the receipt of the decision of the arbitrator and notification of the time when it was filed, either party wishing to have the decision of the arbitrator reviewed by the industrial board, must file a petition therefor with said board within fifteen days after the receipt of "a copy of the decision and notification when it was filed:" and, too, within twenty days of said date "file with the board either an agreed statement

19—*Ohio Building Safety Vault Co. v. Industrial Board*, 277 Ill. 96 (Af.); *Victor Chemical Works v. Industrial Board*, 274 Ill. 11 (Af.); *Armour & Co. v. Industrial Board*, 273 Ill. 590 (Af.); *Goelitz Co. v. Industrial Board*, 278 Ill. 164 (R. R.); *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179 (R.);

*Chicago & Alton Railroad Co. v. Industrial Board*, 274 Ill. 336 (Af.).

In the *Victor Chemical Works* case, the court says: "But this is not a proceeding at law and is not altogether governed by the rules of legal proceedings." This was a case before the Industrial Board.

of the facts appearing upon the hearing before the arbitrator or committee of arbitration, or if said party shall so elect correct stenographic report of the proceedings at such hearing."

Though the statute says that the report of the evidence must be filed in twenty (20) days, this is *directory* and not *mandatory*, it will be sufficient if it is filed any time before the hearing before the board.<sup>20</sup>

#### FINDINGS OF ARBITRATORS

The arbitrators in acting under appointment of the industrial board, act ministerially as does a master in chancery. The evidence that they hear must be "competent and legal, as tested by the usual rules for producing evidence in any legal proceeding, to sustain their findings, otherwise they could make an award on other incompetent evidence or no evidence at all, and this was not contemplated by the law. Such evidence must also be preserved and incorporated into the record of the proceedings, as provided in the act and as above pointed out. If books and records are examined, the contents relied upon must be competent and properly authenticated, and must be set out in the record of the proceedings. While a view or inspection of premises might be helpful to the arbitrators in making a decision, there should be evidence of the fact, unless all parties agreed that the arbitrators might decide a claim before them from such view or inspection, alone. In short, there must be some competent evidence to sustain the decision of the arbitrators and of the industrial board, and if founded on hearsay or other improper or insufficient evidence it is the duty of the circuit court, on certiorari,

20—Bloomington D. & C. R. R. Industrial Board, 277 Ill. 333 (R. v. Industrial Board, 276 Ill. 454 R.).  
(Af.); Illinois Midland Coal Co. v.

to remand the proceedings to the industrial board for proper proceedings." *Victor Chemical Works v. Industrial Board*, 274 Ill. 11.

In *Goelitz Co. v. The Industrial Board*, 278 Ill. 164, the court said: "The arbitrators and the board, in reviewing cases, must rest their findings upon competent and legal evidence, as tested by the elementary and fundamental principles of judicial inquiry." \* \* \* Here the board awarded the payment of the compensation in a lump sum. In reversing, the court says: "There should be some showing by evidence, or by the facts stipulated by counsel for both parties, that it is for the best interests of the party applying for it that the compensation be paid in a lump sum. We do not think the board is authorized to proceed on his point, more than on any other, on mere conjecture, surmise or speculation or to assume anything." (Quoted from page 172.)

#### FINDINGS OF INDUSTRIAL BOARD

The *Illinois Midland Coal Co., Plaintiff in Error v. The Industrial Board*, 277 Ill. 333 (R. & R.). In this case it was held that the "finding" part of the industrial board's record did not support the adjudicating part. The finding was that the employee is "now totally disabled." The adjudicating part ordered that he be paid a certain sum for 416 weeks and thereafter a pension of \$21.36 a month so long as he lived. In reference to this finding the court says: "A man might now be totally disabled and yet not permanently disabled. It is true that the finding also states that compensation should be paid to Seddon as long as he lived, but if he was not permanently disabled such payments ought not to be made if he recovered, and the board could not hereafter change its finding unless there was a change in the physical condition of Seddon, even though it had made

a mistake in the original finding as to whether or not he was permanently disabled. It is important, therefore, that in making its finding the board should state accurately whether the injured person was completely disabled so as to be permanently incapable of work or was totally incapacitated for a limited period of time. The finding of the industrial board in this cause was not sufficient to sustain an order for permanent disability."

In *Dietzen v. Industrial Board*, 279 Ill. 11, the court says: "While the industrial board's findings of fact are conclusive on this court, the legal conclusions of that board, based upon such findings, are subject to the supervision of this court. The Workmen's Compensation Act does not make the board's legal conclusions binding upon the court. If it is clear from the facts that as a legal conclusion an injury was not accidental or that it did not arise in the course of the employment, a contrary conclusion will not be allowed to stand."

If the board's finding is sufficient in law the supreme court will presume that evidence heard was sufficient to support the findings. This is treating the board as a common law jury and putting the burden upon the one who attacks the record to furnish the evidence. This is just opposite to the rule and practice in chancery.

*Smith-Loehr Co. v. Industrial Board*, 279 Ill. 88.

It is to be noted that the above case was a review of the industrial board's record under a common law writ of certiorari.

#### INDUSTRIAL BOARD'S CONCLUSIONS OF FACT

It is the conclusions of fact from the competent evidence before the industrial board, and not the legal conclusions, that will not be disturbed on review by the circuit and supreme courts, that view the decision of the board, as they do the verdict of a common law jury. Ultimately, as a jury is before it acts, the industrial



board is subject to the guidance and instruction of the court, upon the principles of law applicable to the facts under consideration.<sup>21</sup>

REVIEW OF INDUSTRIAL BOARD'S RECORD BY A COMMON LAW  
CERTIORARI—WRIT OF CERTIORARI

The industrial board's record can be reviewed by the common law writ of *certiorari* issuing out of the office of the clerk of the circuit court, but not out of the supreme court. In this proceeding the court is not governed by any of the provisions of the Workmen's Compensation Act. The facts before the board will not be reviewed except so far as necessary to determine whether it has acted within or outside of its limited sphere.

The Workmen's Compensation Act put automatically all employers, who are engaged in "occupations," "enterprises" or "businesses" that are "extra-hazardous," under its terms and provisions; it puts likewise outside the provisions of the act all employees "whose employment is *but casual* or who is not engaged in the usual course of the trade, business, profession or occupation of his employer." It is within the scope of the inquiry under a common law writ of *certiorari*, to determine from the evidence preserved by stenographic report in the record whether the employer is liable because conducting an occupation that is "extra-hazardous." And likewise to determine from the evidence submitted whether the employment of the employee is *but casual*.

21—Bloomington, Decatur and Champaign Railroad Co. v. Industrial Board, 276 Ill. 454 (Af.); Chicago Packing Co. v. Industrial Board, 282 Ill. 497 (Af.).

For an exception to the rule that conclusions of fact by the Indus-

trial Board are not reviewable by the court. See: Jurisdiction of the subject matter, Sec. 3, of the act "Extra-hazardous occupations" and Sec. 5 of the act "Employees" whose employment is "casual."

In *Hahnemann Hospital v. Industrial Board*, 282 Ill. 316, the court says:

"Only two questions are presented for the consideration of this court: (1) Was appellee, at the time of the accident in question, engaged in an extra-hazardous occupation, and thereby conclusively presumed to have elected to provide and pay compensation under the Workmen's Compensation Act of 1913, in force at the time of the accident; and (2) Did the injury and resultant death arise out of and in the course of the employment."

#### REVIEW OF INDUSTRIAL BOARD BY WRIT OF CERTIORARI

"The only office which the common law writ of *certiorari* performs is to certify the record of a proceeding from an inferior to a superior tribunal. The superior tribunal, upon an inspection of the record alone, when the return is sufficient, determines whether the inferior tribunal had jurisdiction of the parties and the subject matter, and whether it has exceeded its jurisdiction, or has otherwise proceeded in violation of law. \* \* \*

An exception to that rule is made when the question is, whether jurisdictional facts were or were not proved. \* \* \*

The industrial board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions or to an accident not within the provisions of the act. \* \* \* The record in this case properly contains a stenographic report preserving all the evidence that was considered by the industrial board by the positive requirements of paragraph (e) of section 19 of the Workmen's Compensation Act of 1913, and it was therefore properly certified by that board as a part of the record. We think it therefore proper for us to review the record, including the evidence certified, and from the same determine the two jurisdictional questions presented for our consideration in this appeal."

See further as to above exception to rule: Under Ju-

risdiction of Subject Matter, "Extra-Hazardous" occupation, section 3 of the act (a). Section 5 of the Act "Casual Employee."<sup>22</sup>

In *Smith-Lohr Coal Co. v. Industrial Board*, 279 Ill. 88 (Af.). The industrial board's record was reviewed under a common law writ of *certiorari*. Here the employee sought to have a statutory review of the industrial board's record but the court held that the only question, that could be considered, was whether the board was acting within its statutory jurisdiction. The jurisdictional point was, that the record failed to show that the employer had notice of the accident and that the evidence did not support the award.

The reply of the court is, that the evidence taken by the committee of arbitration did show that the claimant had notified plaintiff of his injury verbally (279 Ill. 92), and that additional evidence had been taken by the board and that "it must also be assumed that the additional evidence offered supported the finding of the board on the question of temporary and total disability."

#### PROVISIONS OF STATUTE FOR REVIEW

The statute provides<sup>23</sup> that the decision of the "industrial board may be reviewed in the circuit court of any county where any of the parties defendant may be found." The party desiring to have a review files a *praecipe* and the clerk of the court issues a writ of *certiorari*, which must be served on some member of the board or the secretary of the board; all other persons in interest shall be served by *scire facias*. Service may also be had upon the board and all parties in interest by mailing notices to the last known place of residence

22—*Courter v. Industrial Board*,  
264 Ill. 488; *Baer's Express Co. v.*  
*Industrial Board*, 282 Ill. 316 (R.  
R.).

23—Sec. 19 (f), *Sess. Laws*, 1917,  
p. 502.

of the parties ten (10) days before the return day of the writ. Any party in interest may also have a review by bill in chancery filed in any county where any of the parties defendant may be found. Errors of law only are passed upon in review; and the proceeding to review must be "commenced within twenty (20) days of the receipt of the notice of the decision of the board."

The statute also provides that the decrees, judgment, and orders of the circuit court may be reviewed on questions of law only by the supreme court upon a writ of error.

#### METHOD OF GETTING IMPROVEMENT BOARD RECORD INTO CIRCUIT COURT

In *Forschner & Co. v. Industrial Board*, 278 Ill. 99, the court says: "The office of the writ of *certiorari* is to bring before the circuit court for review the decision of the industrial board upon questions of law only. \* \* \* The return to the writ must show that the industrial board had jurisdiction to make the order and in doing so it acted legally."

In this case the employee made application under section 9 to have his compensation paid in a lump sum.

"Copies of the notices of the parties filing the petition for commuting the award to a lump sum are included in the return to the writ, *but when they were served, how they were served, or whether they were served at all is not shown*, except by recitals in the industrial board's record." \* \* \*

"We do not decide whether this would constitute an insuperable defect, but whether it would or not, it would at least be much better practice for the return to show service of the notice otherwise than by a recital in the order of the board that proper notice had been given."

The notice given said that a hearing would be had

on the 18th of May. The board did not show that any hearing was had upon that day.

But on the 25th of May counsel for the petitioner stated to the board that he would like to have the record show that the employee appeared on the 18th and that certain facts, naming them were sworn to by employee. The court says: That whether the employer was bound to appear, there was no legal and competent evidence that would authorize the board to change the award to a lump sum.

CERTIORARI AT COMMON LAW AND UNDER COMPENSATION ACT  
DIFFERENTIATED

In *The People ex rel. v. McGoorty*, 270 Ill. 610, the distinction is pointed out between the common law writ of *certiorari* and the writ of *certiorari* that is referred to in section 19 of the Compensation Act, under which alone the orders and the decrees of the industrial board can be reviewed.

The Compensation Act is a statutory proceeding and the legislature had the power to provide how cases arising under the act shall be reviewed. And the fact that one way has been provided excludes every other way.

The functions of the circuit court, when a writ of *certiorari* is sued out under the Compensation Act, is entirely different, "From the powers of the court (quoting from page 621 Ill. 270) when the common law writ of *certiorari* has been sued out, in which the court could only review the record of the proceedings and either dismiss the petition and quash the *certiorari*, or quash the proceedings.

"In case a suit in chancery is brought in the circuit court, as provided in clause (f) the duties and powers of the court therein prescribed are different from the powers and duties of the court in other chancery proceedings. In short, all proceedings under the Workmen's

Compensation Act are purely and entirely statutory, and if a writ of *certiorari* is awarded by the circuit court or a suit in chancery is commenced, the proceedings thereunder are not the same as in other similar suits but are governed wholly by the statute in question. Where, in special statutory proceedings, one form of review is specifically given, all other forms of review are

#### PRACTICE

On whom is the burden of preserving the evidence that will support a decision of the industrial board?

In chancery the burden is upon the party who takes a decree, an affirmative decree, unless it is merely a decree dismissing the bill for want of equity, of preserving the evidence that will support the decree. On review there will be no presumptions that any evidence was heard that does not appear in the record, or that there is any other support for the action of the court than appears in the record taken up for review.

In *Bradley Manfg. Works v. Industrial Board*, 283 Ill. 468, John Garrett in his notice of claim said: That he sustained injury May 12, 1915 while "raising a heavy piece of iron or machinery to attach or hook to a carrier," etc., and that he was "suddenly struck with paralysis, caused from heavy lifting." The committee to whom the matter was referred found that he was not entitled to compensation.

On review before the industrial board, counsel for the employer made a motion attacking the jurisdiction of the board on the ground that the claimant had not filed a properly authenticated report of the evidence heard by the committee. The industrial board overruled the motion, heard further evidence, and made an award.

On writ of *certiorari* the circuit court quashed and set aside said award and made an order that the case was proper for review in the supreme court.

In sustaining the act of the circuit court, the supreme court says: "The decision of the industrial board does not purport to set out the testimony heard by it, even in substance, but gives the conclusions of the board drawn from the testimony. Those conclusions appear to have been drawn from evidence that plaintiff in error's injury resulted from a fall "while descending the stairs" and striking his head against frame of a door."

The court says: "So far as this record shows, no notice was ever given defendant in error of any injury resulting from a fall down a stair."

Court says this is lack of evidence and not insufficient evidence.

Court: "Plaintiff in error contends that the evidence heard by the industrial board on review not having been preserved it will be presumed it was sufficient to sustain board's decision and relies upon Smith case, 279 Ill. 88." This presumption could not be indulged because the law practice is followed in making up the record.

#### CONSTITUTION

In a study and construction of the Workmen's Compensation Act the following clauses of the constitution, that limit the power of the legislature must be kept in mind:

No person shall be deprived of life, liberty or property, without due process of law. Section 2, article 2.

The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law. Section 5, article 2.

Every bill shall be read at large on three different days, in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage; and every bill passed by both houses shall be signed by the speaker thereof. No act hereafter

passed shall embrace more than one subject, and that shall be expressed in the title. \* \* \* Section 13, article 4.

The supreme court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases. \* \* \* Section 2, article 6.

The circuit courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law. \* \* \* Section 12, article 6.

The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. Section 22, article 4.

In the *Deibeikis, Appellant v. The Link-Belt Co.*, 261 Ill. 454, the court held that the act was not in violation of said section 5, article 2. The act was again sustained upon the same point in *Dietz v. The Big Muddy Coal Co.*, 263 Ill. 480.

In *Dragovich, Adm'r, v. The Iroquois Iron Co.*, 269 Ill. 478, the court held that the act was not in violation of said section 13, article 4. The same point was made against the act and overruled in *Richardson Adm'r v. Sears, Roebuck & Co.*, 269 Ill. 478.

*Crooks v. Tazewell Coal Co.*, 263 Ill. 343 (Af.). Case.

*Richardson, Adm'r v. Sears, Roebuck & Co.*, 271 Ill. 325 (R. R.). Act.

*Frey, Def. v. Kerens-Donnewald Coal Co.*, 271 Ill. 121 (Af.). Act.

*Nakwosas v. Western Paper Stock Co.*, 272 Ill. 138 (Af.). Case.

*Devine, Adm'r v. Delano et al., Receivers*, 272 Ill. 166 (Af.). Case.

*Bell v. Toluca Coal Co.*, 272 Ill. 576 (Af.). Case.



Von Boeckmann v. Corn Products Refining Co., 274 Ill. 605 (R. R.). Case.

Constitutionality of the act sustained in the above cases.

In Parker-Washington Co. v. The Industrial Board, 274 Ill. 498, it was held that the act was not in violation of said section 22, article 4.

In Courter, Petitioner v. The Simpson Construction Co., 264 Ill. 488 (writ dismissed), it was held that clause (f) of section 19 of the Act of 1913, was unconstitutional because it was an attempt to confer original jurisdiction upon the supreme court, in violation of section 2, article 6.

In Lavin, Admr. v. The Wells Bros. Co., 272 Ill. 609, and Christensen v. The Bartelmann Co., 273 Ill. 346, the question arose whether by virtue of section 10 of the Act of 1911 in view of section 12, article 6 (the supreme court shall have jurisdiction of all causes in law and equity), an appeal could be prosecuted from the circuit court direct to the appellate court. The court held that an appeal would lie by virtue of section 8 of the Appellate Court Act and section 91 of the Practice Act, notwithstanding there was no provision in the act for such appeal.

**“ALL CAUSES IN LAW AND EQUITY”—MEANING OF THE TERM  
—EMPLOYEES CLAIM A PROPERTY RIGHT WITHIN TERMS OF  
THE CONSTITUTION**

In support of the proposition, that an employee's claim for compensation for injuries sustained by negligent acts of the employer within the meaning of section 12, article 6, of the constitution, is a property right of which the circuit court has original jurisdiction, the court observes:

“We have held that the term ‘suit or proceeding at law or in ‘chancery,’ and the similar expression used in the constitution, ‘all causes in law and equity,’ in-

clude every claim or demand in a court of justice which was known at the adoption of the constitution as an action at law or a suit in chancery and all actions since provided for in which personal or property rights are involved of the same nature as previously existing actions at law or in equity, but they do not apply to special statutory proceedings involving rights and providing remedies which were not of a kind previously existing either at law or in equity. (Douglas v. Hutchinson, 183 Ill. 323; Grier v. Cable, 159 idem 29; Brueggemann v. Young, 208 idem 181; Myers v. Newcomb Drainage District, 245 idem 140.) These cases decide that the presentation of a claim in the county court and the proceedings there for its allowance and classification, the contest of an election and the proceedings for the establishment of a drainage district are all statutory proceedings, to which the term 'suit or proceeding at law or in equity' does not apply. The rights sought to be secured by such proceedings were conferred only by statute and the manner of proceeding was not in accordance with the common law method. The practice of entertaining an appeal from a judgment of the circuit court rendered on an appeal from a judgment of the county court allowing or rejecting a claim has, however, been uniformly recognized. The right sought to be enforced in this proceeding is a statutory right which did not exist at common law, is not a claim for damages, but is a claim for compensation provided by the statute. While it is not a right which existed at common law, it is not different in character from such right. The claim to compensation is a property right,—the right to receive a sum of money fixed by the statute in such amounts and at such times as the court shall determine. It is a right of the same general character as that of any simple creditor. The method provided for its enforcement is not in its primary stages in accordance with common law methods. The selection of the board of arbitration, the hearing of

the case on its submission to them and the finding made by them are purely statutory, as in the case of a claim presented in the county court for probate; but, as in that case, the method of enforcement assumes a different aspect in the circuit court and the proceedings are according to the course of the common law, the result is a judgment rendered for the payment of money and the award of execution for its collection. The manner of beginning the proceeding in the circuit court is not substantially different from an appeal from the judgment of the county court on a probate claim or an appeal from a justice of the peace, and it is almost exactly the procedure provided for the review of the judgments of justices of the peace by writ of certiorari. The character of the right, the method of procedure and the judgment rendered are all of the kind recognized by the common law and bring the case within the terms of the statute providing for appeals to the appellate court."

In *Casparis Stone Co. v. Industrial Board*, 278 Ill. 77, it was held that the "classification" provided for in the act bore a reasonable relation to the objects sought to be accomplished and was uniform as to all members of the class to which it was made applicable, and hence was not in violation of section 22, article 4.

In *Keeran v. Peoria, Bloomington & Champaign Traction Co.*, 277 Ill. 413, it was contended that section 29 of the act, that divides third persons, who inflict injuries upon the servants of others, into two classes—those who have accepted the provisions of the act and those who have not accepted said provisions—was in violation of section 22, article 4. But it was held that it was not class legislation, because the employee had the right of election. It was by virtue of his contract of hire that he had parted with his right of action against a third person and had a right against the master to obtain a fixed and definite sum from him.

It was held that the provisions of section 29 were rea-

sonably within the title of the act and therefore not in violation of section 2, article 6.

In *Crooks, Appellee v. The Tazewell Coal Co.*, 263 Ill. 343, following the *Deibeikis* case, in an action on the case, the court observed:

“Appellant cannot insist that appellee be bound by all the provisions of a law which appellant has elected not to be bound by. There was, therefore, no error in permitting appellee to show that appellant had elected not to come under the act, nor in giving the instructions on behalf of the appellee, which were drawn upon the theory that the defenses of assumed risk, fellow-servant, and contributory negligence were not available, except that the latter might be shown for the purpose of reducing the damages. Nor was it error to refuse the instructions of appellant which were based upon the above-named defenses.” In this case the constitutionality of the Act of 1911, as a whole, is sustained. The Act of 1911 is again sustained for the same reason as was stated in the *Deibeikis* case, in *Dietz, Appellee v. The Big Muddy Coal & Iron Co.*, 263 Ill. 480, action on the case.

In *Dragovich, Adm'r, Appellee v. Iroquois Iron Co.*, 269 Ill. 478, the court held that the Act of 1911 was not open to the attack as being unconstitutional, because in its passage certain requirements of the constitution had not been observed.

The same point was made against the Act of 1911, in *Richardson, Adm'r, Appellant v. Sears, Roebuck & Co.*, 271 Ill. 325, and overruled.

The same point was made against the Act of 1911, in *Frey, Defendant in error v. The Kerens-Donnewald Coal Co.*, 271 Ill. 121, and overruled.

The same point was made against the Act of 1911, in *Nakwosas, Appellant v. The Western Paper Stock Co.*, 272 Ill. 138, and overruled.

The same point was made against the Act of 1911, in

Devine v. Delano, 272 Ill. 166, and overruled. Action on the case.

In Bell, Appellee v. Toluca Coal Co., 272 Ill. 576, the court again sustained the constitutionality of the Act of 1911.

Von Beeckmann, Appellee v. The Corn Products Refining Co., 274 Ill. 605 (R. & R.). This was an action on the case. In the declaration the allegation was that the defendant was on May 11, 1913, operating a glucose factory in Pekin, and the employee was injured while in the exercise of due care and caution, in consequence of the defendant's violation of the factory act, in failing to cover certain exposed cog-wheels. The appellant filed a general issue and special pleas averring that both were under and bound by the provisions of the Workmen's Compensation Act of 1911. The employee filed a replication setting forth that the Workmen's Compensation Act of 1911 was invalid because the act was not printed before a vote was taken upon its final passage. The employer demurred to the replication. The court heard evidence on the question, overruled the demurrer, and held the act invalid for the reason set forth in the replication. Thereafter, on the trial of other issues, the court entered judgment on a verdict of \$10,000. Appeal was taken to the Appellate Court of the 3rd District, and was thereafter on the *constitutional* question transferred to the supreme court. The court says that, notwithstanding the fact that the constitutional question is no longer open, the appellee is entitled to have the cause reviewed in this court. The court then referred to section 3 of the Act of 1911 and says that the act was passed in a manner provided by the constitution and the circuit court erred in holding the act invalid, citing the Dragovich case and the Frey case.

In Parker-Washington Co., Plaintiff in error v. The Industrial Board, 274 Ill. 498 (Af.), the point was urged that section 31 of the Act of 1913 was unconstitutional

as requiring an unreasonable and arbitrary classification, setting apart contractors from all other classes of persons and imposing burdens upon them that are not imposed upon others. In holding that section 31 of the act was not unconstitutional, the court says:

“This court has repeatedly held that the legislature may legally classify persons so long as the law making the classification is general and has some reasonable relation to the end sought, so that the difference between the classes is not a purely arbitrary one. Citing authorities. A law is uniform when all the persons brought within the relation and circumstances provided for are affected alike.”

Chicago Railways Co., Plaintiff in error v. The Industrial Board, 276 Ill. 112 (Af.). This was a writ of error to review a judgment confirming an award of the industrial board under the Act of 1913. It was contended that the Act of 1913 is unconstitutional because it interfered with the freedom of contract, is class legislation and gives special privileges to certain individuals which are denied to others. Following the *Deibeikis* case the court held, that there was no material distinction between the Acts of 1911 and 1913 as regards employers engaged in extra-hazardous occupations and further that the clause “carriage by land or water” in section 3, paragraph (a), Act of 1913, includes a street railway company.

#### SECTION 29 OF THE ACT OF 1913, SESSION LAWS, P. 354

The validity under the constitution and the construction of section 29, have been considered and determined by the supreme court in *Keeran, Adm'r, Appellant v. The Peoria, Bloomington & Champaign Traction Co.*, 277 Ill. 413 (R. & R.); *Friebel, Appellant v. The Chicago City Railway Co. et al.*, 280 Ill. 76 (Af.); and *Johnson, Plaintiff in Error v. Choate*, 284 Ill. 214 (Af.). All three

of these cases were actions on the case, and by an employee or his legal representative against a third party, not his employer. The Employment Act was applicable in all these cases either on account of election by the parties, or on account of the accident having occurred in an extra-hazardous occupation. In the Keeran case, it was contended "that the provision of section 6, that no common law or statutory right to recover damages shall be available to any employee within the provisions of the act, or to anyone dependent upon him, or to his legal representatives, applies only to suits or claims against the employer and has no reference to claims against third persons; that if it is regarded as applying to claims against third persons for injury occasioned by their negligence, this section and section 29 are unconstitutional because based on class legislation, contrary to section 22 of article 4 of the constitution, and because the title of the act is not specific enough to include the provisions of section 29, and because that section is not germane to the act and causes the act to include more than one subject. The appellant also contends that the pleas do not state facts showing that the decedent's employers were under the Workmen's Compensation Act.

"If section 6 were to be construed alone the appellant's claim in regard to its meaning would have much force, but the rule of construction requires the whole act to be construed together, and in determining the meaning of section 6 the provisions of section 29 cannot be disregarded. The two sections, when construed together, must be regarded as meaning that no common law or statutory right to recover damages for any accidental injury arising out of and in the course of his employment shall be available to any employee, either against his employer or against any third person whose negligence may have occasioned the injury, where such person had also elected to be bound by the act, the

employer in such case being subrogated to the right of the employee or his personal representative to recover, and the amount of the recovery being limited to the aggregate amount of compensation payable under the act. Where, however, the injury for which compensation is payable under the act was not proximately caused by the negligence of the employer or his employees and was caused by the negligence of some other person who had elected not to be bound by the act, then an action may be brought to recover damages by the injured employee, or his personal representative, or the employer, according to circumstances. It was clearly the intention of the legislature that no employee who is under the provisions of the act shall receive more, and that no employer who is under the provisions of the act shall pay more for an injury to such an employee arising out of and in the course of the employment, than the amount of compensation fixed by the act. The act divides employers and employees who have accepted the provisions of the act from employers and employees who have not accepted the provisions of the act, and it establishes a different rule in regard to the respective rights and liabilities of all employers and employees under the act from that which applies to employers and employees not under the act. This classification the appellant regards as unreasonable so far as it concerns the liability of employers who are under the act to the employees of others who are under the act." Quoted from 277 Ill. 413-419.

#### PURPOSE AND OBJECT OF THE ACT

In speaking of the purpose and object of the enactment of the Workmen's Compensation Act, the court continues: "The Workmen's Compensation Act is an entire departure from the common law in regard to the relation of master and servant. It does not rest on the



theory of negligence, but on the theory that the injuries to workmen and deaths caused by accidents in any business should be regarded as a part of the expense of the business and should be borne by the business. We have held the act constitutional in many decisions, beginning with *Deibeikis v. Link-Belt Co.*, 261 Ill. 454. It is elective, and results in two systems in the law of the state by which the rights of employers and employees are governed. Under the act the amount which a workman may recover for a particular injury is fixed by law. He may recover this amount regardless of the cause of the injury, the fault of his employer, or his own negligence, so long as it arose out of and in the course of his employment. This valuation applies to all injuries which come within the provisions of the act and to all persons who come within its provisions, and it is not an unreasonable classification which applies the rule uniformly to all persons affected by the act. The act is elective, both for employers and employees. It is apparent that the legislature considered the law of negligence as applied to the relation of master and servant as unsatisfactory in its results and sought by this act to secure to injured workmen and their dependents a more certain, prompt and inexpensive relief than the common law action afforded, by imposing upon the employer, as incident to his business, the burden of providing for the loss suffered by his employees from injuries received in his business according to a certain definite scale. The burden was not, however, imposed absolutely. The system was submitted to each employer and employee for acceptance or rejection. The employers who accepted the provisions of the act assumed the definite liabilities it imposed upon them in consideration of their exemption from their common law liability, while the employees who accepted surrendered their common law rights in consideration of the definite remedy given by the act. The provisions of the act become a binding con-

tract as to all who accept them. So far as employers and employees under the Act are unconcerned, all *accidental injuries* to workmen arising out of and in the course of their employment are to be paid for by the employer in whose service the injury occurred, or the employer negligently causing the injury, at the rate fixed in the schedule established by the act. This provision constitutes part of the contract entered into by the election to accept the provisions of the act. It is competent to enter into such agreement, and no constitutional rights are violated by its enforcement." Quoted from 277 Ill., p. 420-1.

#### EMPLOYER

What common law rights does the employer lose by electing to be bound by the Workmen's Compensation Act?

1st. He loses the right of trial by jury guaranteed by the constitution.<sup>24</sup>

2nd. He loses the right to interpose as a defense, assumed risk, contributory negligence, and fellow-servant.<sup>25</sup>

3rd. He loses the right to defeat a recovery because guilty of no negligence<sup>26</sup> and to rest upon the common law doctrine of *damnum absque injuria*.

In *Deibeikis v. Link Belt Co.* (261 Ill. 465), the court says, in construing section 3 of the act, and replying to the contention that "it deprived the employee of his common law remedies, while it allowed the employer to retain them:"

"This is clearly a misapprehension, as the proviso in

24—*Deibeikis v. Link Belt Co.*, 261 Ill. 455; *Crooks v. The Tazewell Coal Co.*, 263 Ill. 343.

25—Sec. 1, par. (c); Sec. 3, par. (a).

26—*Casparis Stone Co. v. The Industrial Board*, 278 Ill. 77.

Non-resident alien relatives of a deceased employee, who in his lifetime contributed to their support, may claim compensation under provisions of the act. *Victor Chemical Works v. The Industrial Board*, 274 Ill. 11.

that section enlarges the remedy of the employee and correspondingly restricts that of the employer. By this proviso, in case an employee receives an injury as the result of the intentional omission of the employer to comply with statutory safety requirements, the employer, although having elected to come within the provisions of the act, cannot avail himself of anything in the act to affect his liability under such circumstances."

4th. The employer loses the right to make a private contract with his employee with reference to liability for future injuries sustained by the employee. In *Chicago Railways Co., plaintiff in Error v. The Industrial Board* (276 Ill. 112), it was contended that the plaintiff in error was not liable under the Workmen's Compensation Act in consequence of a *private agreement* entered into between employer and employee, whereby the employee agreed to assume all risks of accidents and to acquit the plaintiff in error of all liability therefor. In overruling this point, the court says: "The Workmen's Compensation Act is the declared public policy of the state upon the subject embraced in the statute, and provides a method by which employers may exempt themselves from providing and paying compensation under the act to employees for accidental injuries sustained and arising out of and in the course of the employment. It is contrary to the policy of the act to allow an employer, while choosing to come under the provisions of the statute, by not filing an election in writing to the contrary, to relieve itself from liability under the act by private agreement or contract with the employee." See *Devine v. Delano*, 272 Ill. 166, as to clauses in employee's contract that waive the liability of employer, being void.

COMMON LAW DEFENSES OF ASSUMED RISK, FELLOW SERVANT  
AND CONTRIBUTORY NEGLIGENCE

5th. In an action upon the case, where the employer had elected not to come under the Workmen's Compens-

sation Act of 1911 (Crooks, Appellee v. The Tazewell Coal Co., 263 Ill. 343), the appellant contended that the amount that the employee could recover, should *be limited* by the provision of the Workmen's Compensation Act: In reply to this contention the court says: "When the employer has elected not to be bound by the act, then the parties are remitted to their action at law, and are governed in all respects by the rules and principles of law applicable to such action, except, alone as to the matter of defenses of assumed risk, fellow-servant, and contributory negligence.

"Appellant cannot insist that appellee be bound by all the provisions of a law which appellant has elected not to be bound by. There was, therefore, no error in permitting appellee to show that appellant had elected not to come under the act, nor in giving the instructions on behalf of the appellee which were drawn upon the theory that the defenses of assumed risk, fellow-servant, and contributory negligence were not available, except that the latter might be shown for the purpose of reducing the damages."

Employers lose their common law rights by not electing to come under the provisions of the Act of 1911.

Devine, Adm'r v. Delano et al., 272 Ill. 176. and Bell v. Toluca Coal Co., 272 Ill. 576, were actions on the case; and in both of them it was held that the employers having elected not to come under the provisions of the Act of 1911, they could not escape liability to their employees for injuries sustained because the employees had assumed the risk, or because the injury was proximately caused by the contributory negligence of the employee.

#### EXTRA-HAZARDOUS

In Scully v. Industrial Board, 284 Ill. 567 (Af.). Here the employee worked at excavating, connecting sewer pipes and water pipes with the street mains. He was

injured while riding with his employer in an auto from a pipe yard to the place where he was to work. The truck was struck. The court says, that the business was extra-hazardous, because it is a matter of common knowledge that such trenches, as the employee was employed to excavate, extend under sidewalks and under buildings, and the workman is exposed to dangers that would not apply to a servant that was making an excavation for a post, etc.

If an employer is engaged in any "occupation," "enterprise" or "business," that is termed by the statute extra-hazardous, he is brought automatically under the statute and must pay compensation according to the schedule therein named, unless he *elects* not to provide and pay according to said schedule.

But, if he does elect not to so provide, then in an action on the case against him by the employee, he loses the right to interpose the defenses of assumed risk, contributory negligence and fellow-servant.

In *Uphoff v. Industrial Board*, 271 Ill. 312 (R. R.), a carpenter named Bruner was building a broom-corn shed for a farmer, who had been a farmer for 18 years; and Bruner had worked at the carpenter trade for 30 years. It was held, that the building of this crib or broom-corn shed could not be included under the terms: "occupation," "enterprise" or "business" and it could not be included under the term "extra-hazardous"—"the legislature did not intend to include work that every one knows is not extra-hazardous."

In *McLaughlin v. Industrial Board*, 281 Ill. 100 (R.). Here one of the commissioners of highways hired a party to plow, grade a road and haul stumps, after they were pulled out. Hilger was employed by this party.

Kennedy and Rinaker were employed by the same party to blow out the stumps.

Hilger bored some holes under some stumps and his

companion lighted the fuse and put in two sticks of dynamite. In the blasting that followed Hilger was killed.

The court says: "We are not able to agree with the contention that Hilger was engaged in an extra-hazardous occupation." "A common public dirt road is no doubt a structure as commonly defined and understood, but it is certainly not a structure within the meaning of said act. Neither can it be said that the building or repairing of an ordinary dirt road is an extra-hazardous occupation within the meaning of said statute. If Hilger's occupation was an extra-hazardous occupation within the meaning of the statute, it was because of the fact that the commissioners were using explosive materials in dangerous quantities while blasting out stumps and not by reason of the fact that they were building or repairing a structure."

Here the court says that the industrial board had no jurisdiction.

#### CASUAL EMPLOYMENT

A plasterer, who had been employed to plaster a ceiling, fell from a ladder on which he was standing and broke his back. The job was practically finished, the agreed price was \$4.00 a day. He had worked for the same party years before, but done nothing else that year. The court says:

"In our judgment the legislature never intended an employee who was engaged for a job lasting only three or four days to be within the terms of the act, even though the same employee had been employed at irregular intervals during several previous years to perform similar jobs. This being so, there can be no recovery, under the statute, for this injury." Judgment of the circuit court reversed.

Aurora Brewing Co. v. Industrial Board, 277 Ill. 142. (R.).

The word "casual" in the statute has reference to the contract of service, and not to the particular item of work being done at the time of the "injury"; quoted from page 571, Scully Case, 284 Ill. 567.

#### ACCIDENTAL

Court says: "It is, therefore, clear that the word 'accident' and 'accidental injury,' used in the act were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed; also to extend the liability of the employer to make compensation for injuries for which he was not previously liable."

Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378 (Af.).

#### EMPLOYEE

Section 5 of the act enumerates the persons to be included under the term "employee":

First—Every person in the service of the state, county, city, town, township, incorporated village, or school district, body politic, or municipal corporations therein, under appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, township, incorporated village, school district, body politic, or municipal corporation therein; with certain other enumerated exceptions.

Second—Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and minors who are legally permitted to work under the laws of the state, who, for the purpose of this act, shall be considered the same and have the

same power to contract, receive payments and give quit-tances therefor, as adult employees, but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession, or occupation of his employer: provided, that the employee shall not be included within the provisions of this act when excluded by the laws of the United States relating to liability of employers to their employees for personal injuries where such laws are held to be exclusive.

#### COMMON LAW RIGHTS LOST

What common law rights does the employee lose by electing to be bound by the Workmen's Compensation Act?

First—He loses the right of trial by jury that is guaranteed by the constitution.<sup>27</sup>

Second—He loses the common law or statutory right to recover damages for injury or death under an action on the case.<sup>28</sup>

In return he gets a special investigation of the facts of his case by one man specially appointed for the purpose, or a committee of men specially appointed with a hearing in the vicinity where the accident occurred, and opportunity to submit all the evidence oral and documentary that could be offered before a jury, without the delay and struggle with regard to its admission, that is incident to contested actions on the case in the common law courts. "A quick adjustment of injuries according to fixed rules."<sup>29</sup>

Second—He gets a re-hearing on review before the industrial board with an opportunity to submit any more

27—Sess. Laws, 1911, p. 315.

28—Sec. 6, Sess. Laws 1913, p. 340.

29—Victor Chemical Works v. In-

dustrial Board, 274 Ill. 11; Keeran, Adm., Appellant v. P. B. & T. Co., 277 Ill. 413 (R. R.).



evidence, that may have been omitted, before five men who are specially appointed to devote their time and attention solely to the complaints of the employee class.

Third—He has gained a certainty of recovery under a fixed schedule<sup>30</sup> if he can establish by competent evidence that he has sustained injury “arising out of and in the course of the employment.”<sup>31</sup>

Fourth—There remains to him the common law right of a review of all questions of law that arise on the facts developed before the arbitrator or the board.

#### RIGHTS UNDER THE STATUTE

In behalf of the employee in *Deibeikis v. Link Belt Co.*, 261 Ill. 454, in an action on the case, the act was assailed as unconstitutional: (1) It is not a proper exercise of the police power; (2) it is class legislation; (3) it delegates judicial powers; (4) it vests the judiciary with executive powers; (5) it deprives the employee of the right of trial by jury; (6) it subjects the employee to unreasonable search; (7) it deprives the employee of his right to contract and of his natural right of waiver.

The court held, that the act was not obnoxious to any of these objections. The principal one, that it deprives the employee of a jury trial, is met by the reply: That the act is elective. Within thirty days of the date of the employment, the employee has the right to notify the industrial board that he has elected not to be bound by

30—Secs. 7 and 8, Sess. Laws 1917, pp. 493-4; Sec. 9, Sess. Laws 1915, p. 405.

31—Sec. 1, Sess. Laws 1913, p. 337.

It should be observed that section 1 of the Act of 1911 referred to in the above opinion 263 Ill. 480 was amended by the Act of 1913. That

portion of section 1 of the Act of 1911 which provided that an employer who elected not to accept the provisions of the act would thereby be deprived of the common law defenses is limited by the Act of 1913 (Sec. 3, Sess. Laws, p. 339) to extra-hazardous occupations.

the provisions of the act. In case he does this, he is liable to have interposed by the employer, in an action on the case for injuries suffered, the common law defenses known as contributory negligence, assumed risk and fellow-servant.

In an action upon the case (*Dietz v. Big Muddy Coal Co.*, 263 Ill. 480), the declaration averred that the employer had elected not to provide and pay compensation under the Statute of 1911, and that the employee had accepted all the provisions of the said act and was bound thereby. In this case a judgment of \$1,500 was rendered for the employee; on appeal in behalf of the employer, it was contended that the court erred in not allowing the employer to interpose the common law defenses. In sustaining the ruling of the lower court, the court observes:

“Appellant contends that under the proper construction to be given to the Workmen’s Compensation Act the defenses of assumed risk, fellow-servant and contributory negligence are not affected by the act as to employers who have never elected to pay compensation in accordance with the provisions thereof.”

After holding that the averment in the declaration, that the employee had elected to accept all the provisions of the Workmen’s Compensation Act, should be regarded as surplusage, the court continues:

“Both parties (quoting from page 484) to this cause seem to be under the impression that in some way appellee must be regarded as under the Workmen’s Compensation Act, in order to cut off the common law defenses above referred to. This is clearly a misapprehension of the meaning of the act itself.”

After quoting section 3 (Act 1911), the court says:

“The legislature has by language too clear for construction taken away the common law action as to all employees who have elected to be governed by said act. The existence or non-existence of the common law de-

fenses depends upon the *status* of the employer in respect to the act and not the status of the employee."

Then after referring to section 1 (Act 1911), the court continues:

"It was (quoting from page 486) manifestly the intention of the legislature to make the act applicable to all employers within the enumerated employments, unless and until notice in writing of their election to the contrary is filed with the State Bureau of Labor Statistics. All of the employees to whom the act applied were likewise automatically made subject to the law. Both the employer and the employee in the specified employments became subject to the act without any affirmative action upon their part. The elective feature of the act is to be exercised to avoid being governed thereby, and not to cause the act to be applied in any given case."

#### JURISDICTION OF PARTIES

In order that the industrial board may have jurisdiction of the parties, it must affirmatively be made to appear upon its records that the employee, unless it is a case of mental incapacity, has, *within thirty days* after the accident, given notice to the employer apprising him of his claim for compensation, stating his name and address, the approximate date and place of accident, and the cause of the accident. It must also be made to appear that a claim for compensation has been made within six months after the accident, or in the event payments have been made, that written claim for compensation has been made within six months after the payments have ceased. In the first instance the statute does not declare what notice, whether written or oral, shall be given to the employer. It is held, however,<sup>32</sup>

32—Parker-Washington Co. v. (Af.); Suburban Ice Co. v. The Industrial Board, 274 Ill. 498 Industrial Board, 274 Ill. 630 (Af.).

that sufficient facts must appear upon its record from which it can conclusively be presumed that the employer had notice from sources other than directly from the employee.

Section 24 of the Workmen's Compensation Act of 1913 provides: "No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made, within six months after such payments have ceased." This provision of the statute is mandatory.

Haiselden v. The Industrial Board, 275 Ill. 114 (Reversed).

Conway Co. v. Industrial Board, 282 Ill. 313 (Affirmed).

Bushnell, Plaintiff in Error v. Industrial Board, 276 Ill. 262 (Reversed).

#### WHAT INDUSTRIAL BOARD'S RECORD MUST SHOW

To sustain the industrial board's jurisdiction of the subject-matter (*Res*), it must affirmatively be made to appear upon its records that employer and employee cannot agree in regard to some question of law or fact with reference to an injury sustained by an employee arising out of, and in the course of, the employment.<sup>33</sup>

The reason for this is, the industrial board is a court of limited statutory power, and there are no presumptions that it is acting within the scope of its power further than it so appears from its record. Just how this must appear has not been clearly and definitely decided,

In cases of mental incapacity of the employee, notice must be given within six months after such accident.

33—Victor Chemical Works v. Industrial Board, 274 Ill. 11 (Af.).

but in *Conway v. Industrial Board* (282 Ill. 313), it was contended that the industrial board had no jurisdiction because there was no dispute between the parties as to any question of law or fact prior to the filing of the petition. But it was held, as section 6 took away from the employee all other right of action, a failure to pay on demand would be construed as presenting a question for the determination of the board.

### SECTION 3. DEFENSES

The validity of proceedings under section three (1913) of the act depends upon the industrial board having jurisdiction of, or dominion over certain enumerated "occupations," "enterprises" or "businesses" rather than the person of the employer.

Section three provides that it shall not be a defense that the employee assumes the risk of the employment, that the injury or death was caused in whole, or in part by the negligence of a fellow-servant, or that injury or death was approximately caused by the negligence of the employee. The court in putting a limited construction upon this section (*Vaughan's Seed Store v. Simonini*, 275 Ill. 477) says:

"The third section refers primarily to the *business* and not to the person of the employer. Its provisions expressly apply only to employers engaged in the specified extra-hazardous occupations, and provide that in any action to recover damages against such an employer it shall not be a defense that the employee assumed the risk or that the injury was caused by the negligence of a fellow-servant or by the contributory negligence of the employee. These provisions cannot be extended to apply to causes of action not having any connection with the extra-hazardous occupations mentioned. If a man who was engaged in the business of a building contractor in Chicago and who had elected not to provide and pay

compensation according to the provisions of the act should also be conducting a drygoods store in Rockford, and should be sued by a clerk in the store for an injury caused by the negligent arrangement of the stock of goods, the contributory negligence of the clerk, his assumption of the risk or the negligence of a fellow-servant causing the injury would constitute a defense, for this would not be an action against an employer engaged in a hazardous occupation. To give the act any other interpretation would be to render it unconstitutional. The drygoods merchant who, having no other business, had not elected to provide and pay compensation according to the provisions of the act would not be deprived of these common law defenses, and it would not be a reasonable classification to allow such defenses to one merchant and deny them to another, under precisely the same circumstances, because the latter was also engaged in an extra-hazardous occupation elsewhere. The reasonable interpretation of paragraph (b) of section 3 is, that the provisions of paragraph (a) shall only apply to an employer engaged in the extra-hazardous occupations mentioned, so far as such extra-hazardous occupations are concerned." Quoted from 275 Ill. p. 482-3.

#### AWARD MAY BE REVIEWED

"An agreement or award under this act, providing for compensation in instalments, may at any time within eighteen months after such agreement or award, be reviewed by the industrial board at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished, or ended; and on such review compensation payments may be re-established, increased, diminished or ended: Provided, that the board shall give fifteen days' notice to the parties of the hear-

ing for review." Quotation from Sess. Laws, p. 350, 1913. Sec. 19 (h). \* \* \*

Under the provisions of this paragraph, the filing of the petition will be sufficient to give the board jurisdiction of the subject-matter, but before it can act, "an agreed statement of the facts" or the "stenographic report of the proceedings" that supports the previous award, must be produced by the party applying for the change in the award, and "the only additional evidence which may be offered is upon the question whether the disability has recurred, increased, diminished or ended since the time of the making of the award. The award constitutes a final adjudication upon all matters in dispute up to the time of the hearing at which the award is made."<sup>34</sup>

#### JURISDICTION OF THE SUBJECT-MATTER—REVIEW OF IMPROVEMENT BOARD'S FINDING

Employers who are engaged in "occupations, enterprises or businesses" enumerated in paragraph (b) of section 3 of the act.<sup>35</sup>

And employees "whose employment is but *casual* or who is not engaged in the usual course of the trade, business, profession or occupation of his employer."<sup>36</sup>

The determination from the facts developed before the industrial board, whether a liability upon the employer is automatically imposed under section 3 of the act, is a jurisdictional question.<sup>37</sup>

The determination from the facts developed before

34—Simpson Construction Co. v. Industrial Board, 275 Ill. 366 (R. R.); Bloomington, Decatur & Campaign R. R. Co. v. Industrial Board, 276 Ill. 120 (R. R.).

35—Sess. Laws "Employment" 1915, p. 400.

36—Sess. Laws "Employment" 1913, p. 340.

37—Victor Chemical Works v. Industrial Board, 274 Ill. 11; Keenan, Adm., Appellant v. P. B. C. T. Co., 277 Ill. 413 (R. R.).

the industrial board, whether an employee is automatically brought into the class that is termed *casual* under section 5 of the act, is a jurisdictional question.<sup>38</sup>

In these two instances the rule, that the conclusions of fact of the industrial board are conclusive and not reviewable, is not observed. The reason for this is, that the sovereignty of the industrial board is not plenary but limited and the common law, or human reason upon which it is based, is the final arbiter.

#### EXTRA-HAZARDOUS EMPLOYMENT

Though the employer may be engaged in an occupation, enterprise or business that is extra-hazardous under the terms of section 3 of the act, to sustain the power and jurisdiction of the industrial board in making an award for the injury to or the death of an employee, it must affirmatively appear upon its record that the employee, under and in pursuance of his contract of hire was necessarily brought within the field of danger. In other words it must appear that the field of danger and the field of employment are co-extensive, or at least that one in some degree impinges upon the other. If this does not affirmatively appear, the act of the industrial board, in awarding compensation, will be held void on direct attack.

This principle is well illustrated in *Marshall, Adm'x v. City of Pekin*, 276 Ill. 187. In this case a special policeman (desk sergeant) "was accidentally killed in the city hall as he stooped over his desk, by the discharge of his own revolver, which was fired by falling out of his pocket and striking the edge of a cuspidor." The city had for several years maintained a free carriage bridge

38—Secs. 7 and 8, Sess. Laws  
1917, pp. 493-4; Sec. 9, Sess. Laws  
1915, p. 405.



across the Illinois River, but it had never elected to come under the provisions of the act.

The industrial board awarded the administratrix \$2,400, which was sustained by the circuit court. This award was held for naught and the judgment of the circuit court reversed, because the field of hazard, wherein there was a statutory assumption on the part of the employer to make compensation to employees for injuries suffered, and the field of employment neither coincided or even touched.

INTERPRETATION OF STATUTE—EXTRA-HAZARDOUS  
EMPLOYMENTS

Clause 3, paragraph (b) of sections 3 and 31 of the Act of 1913 construed.

Parker-Washington Co., Plaintiff in Error v. The Industrial Board, 274 Ill. 498 (Af.).

The Parker-Washington Co. doing contracting work, including street paving and tunneling, was operating under the Workmen's Compensation Act. This company entered into a contract with the Bessemer Teaming Co. to haul and deliver crushed stone. Harry Crampton, in the employ of the Bessemer Teaming Co., while driving a two-horse team hauling a load of crushed stone, in the act of reaching over to whip the horses fell under the wheels of the wagon and was killed. The Bessemer Teaming Co. was a partnership of which A. W. Kenney was one of the two members. The widow of the decedent filed a claim with the industrial board against Kenney and obtained an award of \$2,912, but no effort was made to recover thereon because Kenney was insolvent. The accident occurred September 25, 1914. On January 13, 1915, a claim was filed with the industrial board against the Parker-Washington Co. The board found that the Washington Co. was under the act, that Kenney and J. P. Bessemer were partners and sub-contractors of the

Parker-Washington Co. at the time of the accident, and that the Parker-Washington Co. was liable and an award was granted of \$2,912.

The court says in its opinion that the plaintiff in error had never elected to come within the provisions of the act, nor had it given notice that it would not come under the act. Its liability, therefore, would depend upon the question whether it was engaged in an occupation, business or enterprise declared to be extra-hazardous.

"We are of the opinion, also, that the occupation, enterprise or business in which plaintiff in error was engaged at the time of the accident if it was not engaged in construction work, but only in the hauling of this crushed stone, can fairly be held to come within the provisions of clause 3 of said paragraph (b),—that is, that it was engaged in a business or enterprise of carriage by land. The enterprise cannot be considered a mere incident to the general business in which plaintiff in error was engaged. It was the business or enterprise itself. The legislature undoubtedly had in mind the danger run by workmen who have to handle property on a large scale in carriage by land or water. This conclusion is not in any way in conflict with the reasoning or finding in *Uphoff v. Industrial Board*, 271 Ill. 312. If it was only the hauling of one load of crushed stone by a farmer or business man who was not engaged in construction or contracting work generally, undoubtedly then the proper conclusion would be to hold the hauling of such single load a mere incident to the main business."

The court says that the plaintiff in error is also liable because it comes within the provisions of section 31 of the act.

In *Hochspeier, Plaintiff in Error v. Industrial Board*, 278 Ill. 523 (Reversed), it was held, that an undertaker who lets his cars and drivers to another undertaker for use as funerals does not thereby become a carrier by land, which is one of the occupations termed extra-

hazardous by clause 3, paragraph (b) of section 3. In differentiating this case from the Parker-Washington case the court says:

"That case is much relied on by defendants in error, but is clearly distinguishable from the case here under consideration. In that case compensation was claimed under the Workmen's Compensation Act for the death of an employee who was engaged in driving a team in hauling for others for hire. He was in the employ of the Bessemer Teaming Company, whose business was hauling, with wagons and teams, goods or material for hire. The Parker-Washington Company, engaged in general contracting and construction, employed the Bessemer Teaming Company to haul from a tunnel which it (the Parker-Washington Company) was constructing, a large quantity of crushed stone and deliver it upon certain streets for use for paving purposes. The driver of one of the teams furnished by the teaming company to do the hauling fell from his wagon, receiving fatal injuries. The teaming company was insolvent and claim was made for compensation against the Parker-Washington Company, which was awarded and the award was confirmed by this court. While it was not expressly so stated in the opinion, the liability of the Parker-Washington Company on the ground that it was engaged in the occupation of carriage by land arose from the fact that the teaming company, the employer of deceased, was engaged in the occupation of carriage by land. The teaming company was clearly engaged in the business or enterprise of carriage by land, and liable, under clause 3 of paragraph (b) of section 3 of the Workmen's Compensation Act, to provide compensation for injury to its employees. The Parker-Washington Company was jointly liable with the teaming company. The latter company being insolvent, the compensation was awarded against the Parker-Washington Company." 278 Ill. 526.

In *Hahnemann Hospital v. Industrial Board*, 282 Ill. 316, one question presented was: Whether the Hahnemann Hospital was engaged in an extra-hazardous occupation. In treating this question as a jurisdictional one, the court observes:

“The industrial board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions or to an accident not within the provisions of the act. \* \* \* The record in this case properly contains a stenographic report preserving all the evidence that was considered by the industrial board by the positive requirements of paragraph (e) of section 19 of the Workmen’s Compensation Act of 1913, and it was, therefore, certified by that board as a part of the record. We think it is, therefore, proper for us to review the record, including the evidence certified, and from the same determine the two jurisdictional questions presented for our consideration in this appeal.”

JURISDICTION OF SUBJECT-MATTER—EXTRA-HAZARDOUS  
EMPLOYMENTS

In *Vaughan’s Seed Store, Defendant in Error v. Simonini*, 275 Ill. 477, the industrial board found that an employee who was a farm-hand of a corporation which was operating stores in Chicago, was injured by the kick of a horse in a stable on the farm. The employer had not elected to come under the provisions of the act, and its liability depended upon the question whether the farm-hand was engaged in an extra-hazardous occupation. The industrial board found that he was. The supreme court in reversing the finding held, that though the branch of its business conducted in Chicago might be extra-hazardous, that conducted upon the farm was not.

In the *Suburban Ice Co., Plaintiff in Error v. The Industrial Board*, 274 Ill. 630 (Af.), the industrial board

found that the employer was liable to its teamster (the employee) who died from the effects of a kick of a horse in the employer's barn. The employer was engaged in the manufacture and sale of ice and the sale of coal, coke and wood. The barn where the injury occurred was entirely disconnected from the ice plant. The employer had never elected to come under the provisions of the Workmen's Compensation Act and its liability depended upon establishing the proposition that the business of teaming and the work done in the barn was so intimately connected with the main business of the employer as to render the corporation liable for the death of the employee. In this case the finding of the industrial board was sustained.

In *Uphoff v. The Industrial Board*, 271 Ill. 312, the court held that it was outside the power and jurisdiction of the industrial board to extend the provisions of the act (Par. (b), Sec. 3, Act of 1913), to the occupation of farming, and in reversing ordered the industrial board's record to be set aside and held for naught.

In *Hochspeier, Inc. v. Industrial Board*, 278 Ill. 523, the court held that it was outside the power and jurisdiction of the industrial board to extend the provisions of the act (Par. (b), Sec. 3, Act of 1913), to the general business of undertaking. The term "carriage by land" is not broad enough to include carriage of persons to funerals.

In *Gibson et al. Partners as The People's Oil Co. v. The Industrial Board*, 276 Ill. 73, the court held that the industrial board was within its power and jurisdiction in finding under paragraph (b), section 3 of the Act of 1913, that the employer who was engaged in the sale and delivery of gasoline was liable to its employee who was killed while attempting to raise the canopy top to an empty gasoline wagon on which he was riding on a return trip from a delivery of gasoline made in pursuance of his contract of hire.

## “CASUAL” CONSTRUED

In Aurora Brewing Co., Plaintiff in Error v. The Industrial Board, 277 Ill. 142 (Reversed), the industrial board found in favor of a claimant who had been engaged in plastering and slipped and fell from a ladder on which he was standing. He had been working about three days and had practically finished the job. The word “casual” as used in section 5 of the Workmen’s Compensation Act (1913) is construed for the first time in the Aurora Brewing Co., Plaintiff in Error v. The Industrial Board, 277 Ill. 142 (R. R.). In this case the industrial board found in favor of a widow whose husband had been engaged to plaster a ceiling of a room that the Aurora Brewing Co. was erecting as an addition to its bottling shop, and while engaged in plastering this ceiling the employee slipped and fell from a ladder on which he was standing and died from the effects of the accident within 48 hours. At the time he was injured he had worked about three days, and had practically finished the job. He was working for \$4.00 a day. The price had been agreed upon after he had begun the work. He was a regular plasterer and was kept busy at his work. He had worked for this company in previous years, but this was the first work for it during 1914. Section 5, in defining the term “employee” says that it shall “not include any person whose employment is but *casual* or who is not engaged in the usual course of the trade, business, profession or occupation of his employer.” The court says that this clause quoted above differs from the British Act in that “and” is used in place of “or,” and says that “or” in the Illinois Act cannot be construed to mean “and” ‘the word should not be given any but its ordinary meaning unless the context and the principal purpose to be accomplished by all the words seems to demand it. Such is not the case here. Under practically the same wording of the

Massachusetts Act the highest court of that state has held that the word "or" could not be construed as meaning "and."

After reviewing the authorities the court conclude that: "It would seem that under the usual and ordinary use of the word 'casual,' as well as by the reasoning of the authorities most nearly analogous, in facts, to this case, the deceased was engaged in a casual employment at the time of the injury. While he had been employed by plaintiff in error at different times in former years, his employment could not be characterized as permanent or even periodically regular. It was a matter of special engagement for each particular time. He could not have complained if some other person had been employed to do this work of plastering in his stead or if at the time of the engagement some other plasterer had been employed to do a part of the work. The arrangement for his work for plaintiff in error at this time and previously was not such as would connect him with the work of the plaintiff in error in its regular work as a regular employee. Of course, this statute should receive a liberal construction in order to carry out its purpose and objects, but the court should not give it a construction clearly outside of the legislative intention. If workmen employed only 'occasionally,' 'irregularly,' 'incidentally' or 'casually' ought to come under the provisions of the Workmen's Compensation Act as well as those who are employed continuously or at stated or regular intervals, that is a question for the legislature and not for the courts. Our duty is only to construe the statute as we find it and give it a reasonable construction according to its spirit. In our judgment the legislature never intended an employee who was engaged for one job lasting only three or four days to be within the terms of the act, even though the same employee had been employed at irregular intervals during several previous years to perform similar jobs. This being so,

there can be no recovery, under the statute, for his injury." Quoted from 277 Ill. p. 149-150.

#### QUESTION OF WAIVER

"Counsel for defendant in error suggest, if they do not insist, that plaintiff in error waived in the trial court the right to raise the question which we have here discussed, by agreeing in the stipulation of facts that both the applicant and the respondent were working under and subject to the Workmen's Compensation Act of Illinois. We think it is clear that this stipulation was not intended to cover the question here passed upon, as that question was discussed at length before the industrial board and passed on squarely by it. Neither do we think that under the holding in *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, it was necessary for the plaintiff in error to raise this question in a formal pleading on the hearing before the industrial board. That case only decides that if a question is not raised on the hearing before the industrial board or before the arbitrators it cannot be raised afterwards on review. That is not the situation here." Quoted from 277 Ill. p. 150.

#### APPLICATION FOR JUDGMENT UNDER SECTION 19 (g), ACT 1913

Application for judgment in the circuit court, when the employer neglects to pay the award and no review is taken by him.

Section 19 (g), Act 1913, provides that either party may file a certified copy of the decision of the industrial board, when no review is had thereon and there is a refusal to pay the compensation awarded, in the circuit court of the county in which the accident occurred, and thereupon the court can enter judgment upon the award against the employer, together with reasonable costs in-



cluding attorney fees. The court cannot under the petition inquire into the question whether the board has acted legally in making the award.

This section is only the means provided for enforcing the payment of the award. What the circuit court is called upon to do is analogous to an execution that issues to a sheriff by the clerk of the court for the purpose of carrying into effect a judgment of the court.<sup>39</sup>

#### PRACTICE

What changes in the common law and equity practice has the Workmen's Compensation Act made?

In effect it has repealed the Statute of 1837; created a tribunal with some of the functions of a chancellor; some of the functions of a master in chancery; some of the functions of a common law jury; it puts five salaried men appointed by the governor, in place of twelve men drawn from the *vicinage*; the circuit and supreme courts are limited to a review of questions of law arising upon facts submitted to and heard by the arbitrator and the board of review, whose function is administrative, with no power to rule on the admissibility of the proof.

The general rule at common law, as to the admission of evidence is, does it tend to prove the issue? The question before the arbitrator or industrial board is: Does the evidence tend to show that the injury, of which

39—Fitt v. Central Illinois Public Service Co., 273 Ill. 617 (R. R.); Bernstein v. Brothman, 275 Ill. 290 (A. F.); McMurray, Adm. v. Peabody Coal Co., 281 Ill. 218 (R. R.); Friedman Manf. Co. v. Industrial Company, 284 Ill. 554 (Af.).

In Friedman Manf. Co. case on application for judgment the point was raised: That the injury oc-

curred outside the state and for that reason the Industrial Board would have no jurisdiction of the subject matter. Held that was a jurisdictional point that might have been raised on certiorari but could not be on application for judgment.

See section 19 of the act amended in 1919, p. 545.

complaint is made, arose "out of and in the course of the employment?" In the first instance, the employee or his counsel must take the responsibility of answering this question, for no judicial answer can be obtained without taking the record to the circuit court through and by the issuance of a writ of certiorari." (279 Ill. 329.)

The difficulty, in the practice before this new tribunal is to draw the line between propositions of fact, as to which the industrial board's decision (finding) "shall, in the absence of fraud, be conclusive," and propositions of law which can alone be determined by the circuit court or finally by the supreme court on a writ of error.

The reality of this difficulty will appear from an examination of the cases that have arisen since the enacting of the act.

In *Hochspeier v. The Industrial Board*, 278 Ill. 523, the industrial board found that the plaintiff in error, a corporation that was engaged in the undertaking business was subject to the act, because it was conducting a business that was extra-hazardous under clause 3, paragraph (b), section 3 of the act. The defendants in error contended that it was a question of fact whether the corporation was engaged in an extra-hazardous occupation, to which the supreme court replied:

"That there was no conflict in the testimony, and whether, under the disputed evidence, plaintiff in error was engaged in the occupation or business of 'carriage by land' is a question of law."

In *Hahnemann Hospital v. The Industrial Board*, 282 Ill. 316, the question arose whether an employee who was shown to be under the influence of liquor was really in such condition as to take him out of the line of employment, was held by the appellate court to be a question of law, but the supreme court reversed the appellate court and held with the circuit court that it was a question of fact.

## NOTICE TO EMPLOYER

## WHAT IS SUFFICIENT EVIDENCE

In *Bushnell, Plaintiff in Error v. Industrial Board*, 276 Ill. 262 (Reversed), the question was whether the employer had notice of the injury to the employee within the statutory time. There was evidence before the board that the foreman had seen the employee limping and had asked him what was the matter, and that he had told him that he had hurt his leg in tearing up a floor. He did not tell him that he intended to make a claim against his employer for compensation. Under all the facts submitted the industrial board awarded a sum of \$300 as compensation. The supreme court in reversing says: "The mere fact that Stewart told the foreman in response to the question as to what caused him to limp, that he had wrenched his leg in attempting to tear up the floor, without making any claim for compensation for such injury, or suffering any interruption of his work, was not sufficient notice of the facts and circumstances of the accident to entitle him to compensation under the provisions of section 24 of that act without the giving of any other notice."

In *Parker-Washington Co., Plaintiff in Error v. The Industrial Board of Ill.*, 274 Ill. 498 (Af.), there was no formal notice given the employer by the employee, but the industrial board held, that formal notice was not necessary because the superintendent of the employer had knowledge from facts and circumstances shown in the evidence. There is no positive rule laid down as to the sources of information that the employer is bound to use in order to be chargeable with notice. In actions on the case, the rule is stated thus: "If the employer knew, or by the exercise of reasonable diligence might have known, then he is chargeable with knowledge." From these two cases, it does not appear whether that old rule

with regard to notice is still to be observed or abandoned. In the Parker case, the supreme court sustained the action of the industrial board. In the Bushnell case, the court overruled the action of the board, in finding that the employer was chargeable with notice.

#### BURDEN OF PROOF ON EMPLOYEE

Bloomington, Decatur & Champaign R. R. Co., Plaintiffs in Error v. The Industrial Board, 276 Ill. 120 (R. R.). When the award of committee of arbitration becomes the final decision of the industrial board, it is the duty of the employee to have filed with the industrial board a statement of the facts proven, or a stenographic report of the evidence taken that supports the award of the committee of arbitration, in case within eighteen months after such award he should want to apply to the industrial board under section 19, paragraph (h), for any increase or change in the award.

#### NECESSITY OF COMPETENT AND LEGAL EVIDENCE TO BE OFFERED BEFORE THE ARBITRATORS AND THE INDUSTRIAL BOARD

In Goelitz Co., Plaintiff in Error v. Industrial Board, 278 Ill. 164 (R. R.). Under section 7, paragraph (a), it is not necessary for the claimant to show that the decedent's wife was dependent upon her husband for support. It is enough if the evidence shows that he was under legal obligation to support her. "The burden of proof is undoubtedly upon the claimant to establish his claim by competent evidence. \* \* \* If there is in the record any legal evidence to support the decision of the industrial board it is not in the province of the courts to pass upon its weight or sufficiency, \* \* \* but the basis upon which the findings rest must be shown by com-

petent legal evidence, and not be based on mere conjecture or surmise.

“The arbitrators and the board in reviewing cases, must rest their findings upon competent and legal evidence as tested by the elementary and fundamental principles of judicial inquiry. \* \* \* Paragraph (a) of said section 7 bases the wife's right (quoted from page 168) for support upon the husband's legal obligation, at the time of his death to support her, and does not require that they be living together at that time or that she is dependent upon him for support. We think the evidence admitted without objection on the hearing before the industrial board justified the finding of that board that the deceased was under legal obligation, at the time of his death, to support his wife.” (Quoted from p. 169.)

It was contended in this case that the industrial board had exceeded its powers in awarding a lump sum to the administrator under section 9 as amended by the Act of 1915, Session Laws, p. 405. That section provides upon *proper notice* to the interested parties and a proper showing made before such board, the amount of the award payable in instalments may be commuted to a lump sum. In reference to what the industrial board's record must show in order to support a commutation of the compensation to an equivalent lump sum the court thus observes: “We do not think that it is necessary to show it to be for the best interests of both parties before the award can be made in a lump sum, but we are of the opinion that there should be some showing by evidence, or by the facts stipulated by counsel for both parties, that it is for the best interests of the party applying for it that the compensation be paid in a lump sum. We do not think the board is authorized to proceed on this point, more than on any other, on mere conjecture, surmise or speculation or to assume anything. The order for payment in a lump sum should not be made unless there is some evidence from which it can be reasonably

presumed that such lump payment will be for the best interests of the party applying therefor, all things considered, and that such order for the payment in a lump sum will not result injuriously to the other party. The fundamental basis of workmen's compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident."

As to the right of an administrator to maintain a claim before the board the court says: "It is not necessary to make proof of the right to sue as administrator. Unless that question is put in issue by the pleadings it cannot be afterward raised. (*Union Railway & Transit Co. v. Shacklet*, 119 Ill. 232.) On this record we do not think plaintiff in error can raise this question."

#### RECORD PROPER AND PROCEDURE

No serious question has yet arisen under the Compensation Act as to the boundaries of what is known in law and equity practice as the "record proper."

December 20, 1915, under paragraph (h), section 19 of the act, a petition was filed to review a previous finding of the committee of arbitration. May 13, 1916, the board made an award. In June, 1916, a writ of *certiorari* was sued out of the circuit court and subsequently the record and proceedings were quashed. In the supreme court the defendant in error contended: "As there was no bill of exceptions, the overruling of the motion to quash the writ could not be urged as error by the plaintiff in error. The court held (*City of Pana v. Industrial Board et al.*, 279 Ill. 279), that no bill of exceptions was necessary; that the petition return and the order of the trial court constituted the record proper.

In this case there was no "stenographic report or agreed statement of facts," and the same were in no way necessary because the court was not called upon to determine whether the board could treat the petition of the employee, which had been filed under paragraph (h), section 19, the same, as though it had been filed under paragraph (b), same section. The court held, that the board could not. This was a direct attack upon the record proper and not an attack upon any conclusion based upon facts in evidence.

In *Sanitary District of Chicago v. The Industrial Board*, 282 Ill. 182, the court refers to the record proper thus:

"The defendants in error moved the court to strike the bill of exceptions from the files because the finding and judgment of the circuit court were not therein set out, and the bill of exceptions did not preserve any exception or specifically state that there was exception to the findings. The motion was denied, and the same argument is made as an answer to the assignments of error.

"The writ of certiorari, the record certified to the court as a return, the order quashing the writ of certiorari, and the judgment of the court, constitute the record."

As said in the *Pana* case a bill of exceptions was unnecessary.

#### RECORD PROPER

(1) Notification that an "employer and employee or personal representative cannot agree," upon "any disputed question of law or fact" is the foundation for the employment board's record.<sup>40</sup>

(2) Next follows the appointment of an arbitrator,

<sup>40</sup>—Sec. 19, Sess. Laws 1917, p. 500.

whose<sup>41</sup> duty is to "make such inquiries and investigations as he or they shall deem necessary, and may examine and inspect all books, papers, records, places, or premises relating to the questions in dispute, and hear such proper evidence as the parties may submit." The hearing must be in the vicinity where the injury occurred and ten days' notice must be given of the time and place of the hearing "to each of the parties or their attorney of record."

(3) The decision of the arbitrator must be filed with the industrial board; "which board shall immediately send to each party or his attorney a copy of such decision, together with a notification of the time when it was filed."

If neither party wishes to further contest the matter submitted to the arbitrator, then this decision of the arbitrator becomes the decision (decree or judgment) of the industrial board.

From an analogy to the record proper in law and equity practice, these decisions (decrees) must be regarded as the record proper. It is on this record, no review having been petitioned for by either party, that a judgment may be entered in the circuit court,<sup>42</sup> upon either party presenting a certified copy of this record.<sup>43</sup>

#### FOLLOWING CONSTITUTES THE RECORD PROPER

(1) Notice to the employer of the accident to the employee must be given not later than thirty (30) days after the accident.

(2) The application for adjustment of claim and order of reference.

41—Idem Sec. (b) Sess. Laws 1917—If either party so elects and deposits with the board \$20 when the claim is for "partial permanent, or total permanent incapacity or death," the compensation may be

determined by a committee of arbitrators.

42—Sec. 19 (g), Laws 1917, p. 503.

43—Fitt v. Central Ill. P. C., 273 Ill. 617 and 275 Ill. 290.



(3) Decision of the arbitrator or committee of arbitration.

(4) Agreed statement of facts appearing upon the hearing before the arbitrator or committee of arbitration, or a correct stenographic report of the proceedings at such hearings.

(5) All documents in the nature of pleadings filed by either party.

(6) The decision of the industrial board.

(7) An agreed statement of facts appearing upon the hearing before the industrial board.

(8) Or in case of election "A correct stenographic report of the additional proceedings presented before the board, in which report the party may embody a correct statement of such other proceedings in the case as such party may desire to have reviewed" \* \* \* to be authenticated by the signatures of the parties or their attorneys, and in the event that they do not agree, by the chairman of the board."<sup>44</sup>

Smith-Lohr Coal Co. v. Industrial Board, 279 Ill. 88 (Af.).

See Sec. 24, 1913, p. 351 and amendments to the Act Sess. Laws 1919, p. 538.

See 282 Ill. 313.

## GENERAL RULES AND RULES OF PRACTICE OF THE INDUSTRIAL COMMISSION OF ILLINOIS

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Revised, effective January 1, 1920

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**RULE 1. DOCKETING AND NUMBERING OF CASES.** All cases brought before the industrial commission shall be

<sup>44</sup>—Smith-Lohr Coal Co. v. Industrial Board, 279 Ill. 88 (Af.). See Sec. 24, 1913, p. 351. See 282 Ill. 313.

Sec. 19 (b) and (c) Sess. Laws 1917, pp. 500-2.

docketed and given a number. In filing any papers or calling the attention of the Commission to any case, the number must be given. Applications for arbitration (non-fatal 10, fatal 10-a) shall be filed in duplicate and one copy shall be sent the respondent by the Industrial Commission. No answer or other pleading need be filed by the respondent.

**RULE 2. REMOVAL OF PAPERS.** No document or file shall be taken from the office of the industrial commission without the consent of the secretary nor by any person other than a party in interest or agent or attorney of record, and then only upon receipt duly given. No papers so taken shall be kept out of the office of the commission more than three (3) days. In no case shall any original application for arbitration, award on arbitration, petition for review or decision on petition for review, bond, or any document relating to security for the payment of compensation, be taken from the office of the commission.

**RULE 3. NOTICE AND PLACE OF HEARING—ARBITRATION.** Hearings upon applications for arbitration which originate in Chicago, shall be held in Chicago. Those which originate outside of Chicago, shall be held in the vicinity where the accident occurred. Ten (10) days' notice of the time and place of hearing shall be given each party.

**RULE 4. PRACTICE BEFORE ARBITRATOR—PROOF.** Hearing on arbitration shall be limited to the points in controversy and each party shall stipulate as to the facts which are not in dispute. If it should appear that a stipulation is entered into, through error and that injustice might result, the arbitrator may, in his discretion, set such stipulation aside and require the submission of evidence. The burden of proof shall be upon the applicant and he shall have the right to open and close the case.

**RULE 5. PHYSICAL EXAMINATION OF INJURED EMPLOYEES.** An employee shall not be required to submit

to a physical examination by a medical practitioner at the time of any hearing upon a disputed claim, such examination at that time may be had only by agreement of the parties. Where compensation is being paid to an injured employee, the employer shall have the right to have the employee examined by a duly qualified medical practitioner or surgeon upon giving the employee notice of the time and place of such examination, which must be reasonably convenient to the employee, and the employee shall have the right to have his own doctor present at such examination or, upon request, shall be furnished with a copy of the report of the doctor selected by the employer.

**RULE 6. SUBMITTING DISPUTED MEDICAL QUESTIONS.** Where there is a dispute between the parties as to the nature and extent of the disability and the probable duration thereof, the parties may stipulate for an examination by the medical director, or other physician or surgeon selected by the industrial commission. The decision of the medical director, or physician selected, shall be the basis of any settlement made.

**RULE 7. PROOF OF RELATIONSHIP AND DEPENDENCY—PROCEDURE.** (a) In arbitration proceedings to recover compensation for fatal injuries to an employee, testimony shall be taken bearing on the relationship of such beneficiaries to and their respective dependency upon said deceased employee at the time of the injury, and a finding shall be made by the arbitrator as to the relationship and respective dependency of said beneficiaries and an order entered for payment of the distributive share of each of the beneficiaries, and the arbitrator may, in his discretion, order a child's distributive share paid to its parent or grandparent for the child's support.

(b) Where no arbitration proceedings are necessary and the employer indicates his or its intention to pay compensation for fatal injuries to employee, the relative dependency of the beneficiaries of the deceased employee

and the share of each shall be fixed upon petition filed with the commission, which petition shall be set for hearing as in rule 10. Such hearings in cases which originate in Chicago shall be before a member of the commission in Chicago; in cases which originate outside of Chicago, either before a member of the commission or before an arbitrator. Testimony shall be taken bearing on the relationship of such beneficiaries to, and their respective dependency upon, said deceased employee at the time of the injury. Such testimony shall be reduced to writing and submitted to the commission and a finding made as to the relationship and respective dependency of said beneficiaries and an order entered for payment of the distributive share of each of the beneficiaries, and the commission may, in its discretion, order a child's distributive share paid to its parent or grandparent for the child's support.

**RULE 8. BOND FATAL CASES WHERE COMPENSATION IS PAID TO REPRESENTATIVE FOR MINOR CHILD.** Whenever a child's distributive share shall be ordered paid to its parent or grandparent, the commission may, in its discretion, require such parent or grandparent to give a bond, to the People of the State of Illinois with surety to secure the payment of said compensation to the child for its support or benefit. Where payment of the instalments in fatal cases is ordered by the commission to be made to the child, the appointment by a court of competent jurisdiction of a guardian is required in order to discharge the employer from liability.

**RULE 9. CONTINUANCES.** In cases which originate in Chicago, continuances shall not be allowed except for cause, notwithstanding an agreement of the parties. In cases which originate outside Chicago, continuances may, in the discretion of the arbitrator or commission, be allowed by agreement of the parties in writing, or for cause at the time of the hearing.

**RULE 10. NOTICE AND PLACE OF HEARING—REVIEW.** Hearings upon petitions for review which originate in Chicago shall be held in Chicago; those which originate outside of Chicago shall be held at central points to be designated by the commission. Ten (10) days' notice of the time and place of hearing shall be given to each party.

**RULE 11. HEARING ON REVIEW AND ADDITIONAL EVIDENCE NOTICE.** The hearing before the commission on review shall be *de novo*. The case will be considered upon the agreed statement of facts or the authenticated transcript of testimony taken before the arbitrator and such additional evidence as shall be submitted upon review. The additional evidence may, in the discretion of the commission, be introduced, even though it is evidence which could have been submitted at the hearing before the arbitrator. Parties desiring to introduce such additional testimony shall give the opposite party a notice apprising him of the substance of the additional testimony not less than five days before the date of the hearing.

**RULE 12. EXTENSION OF TIME FOR FILING PETITION FOR REVIEW.** No extension of time for filing petition for review shall be granted except for cause.

**RULE 13. EXTENSION OF TIME FOR FILING STENOGRAPHIC REPORTS.** The time for filing a stenographic report ordered of the commission within twenty (20) days of the receipt of the copy of arbitrator's award or decision on review, by the party petitioning for review, shall be extended until the report is completed and filed. The time for filing stenographic reports not ordered of the commission, shall be extended upon written motion filed with the commission for cause.

**RULE 14. DISMISSAL, PETITION FOR REVIEW.** No petition for review shall be dismissed upon motion of the party filing same, unless the other side agrees in writing, filed with the commission, to the dismissal thereof,

and such dismissal by agreement must be approved by the industrial commission.

**RULE 15. PETITION TO SUSPEND FOR FAILURE TO SUBMIT TO PROPER MEDICAL TREATMENT.** Petitions to suspend compensation for refusal or failure to submit to proper medical treatment, shall be docketed and set the same as petitions for review (see rule 10), except that where an emergency is alleged in the petition, it may be set immediately and notice of the time and place of hearing thereon, shall be given the injured employee. Such petitions to suspend compensation shall not be acted upon unless compensation is paid up to and including the date of filing said petition.

**RULE 16. FIXING ATTORNEYS', DOCTORS', HOSPITAL FEES, ETC.** Petitions to fix and to determine the reasonableness of any fee or charge for any service rendered in connection with an accidental injury sustained by an employee, shall be docketed and set the same as petitions for review (see rule 10).

**RULE 17. HEARING OF CASES REMANDED FOR FURTHER PROCEEDINGS.** Certified copy of remanding orders entered by the circuit court shall be filed, docketed and set for hearing the same as petitions for review (see rule 10).

**RULE 18. CHARGES FOR TRANSCRIPTS.** Stenographic reports of proceedings before the industrial commission shall be furnished parties and a charge of five cents per hundred words for original and three cents per hundred words for carbon copies made therefor. Payment shall be made in advance.

**RULE 19. CHARGES FOR CERTIFICATIONS.** Certified copies of proceedings before the industrial commission, shall be furnished and a charge of five cents per hundred words of testimony and three cents per hundred words of all other matters contained in such record, made therefor. Payment shall be made in advance.

**RULE 20. PETITIONS FOR LUMP SUM SETTLEMENT.** No

order for commutation of future installments to a lump sum will be entered, unless a failure to commute the installments to a lump sum will result in hardship to the injured employee or beneficiaries of the deceased employee.

Petitions for lump sum settlement (Form 28) which originate in Chicago shall be set for hearing at Chicago and notice sent to parties as in rule 10. Petitions for lump settlement which originate outside of Chicago shall be set for hearing the same as petitions for review (see rule 10), or in agreed matters may, in the discretion of the commission, be determined upon investigation so that it will be understood without the necessity of formal hearing.

The commission shall of its own motion fix attorneys' fees in all cases in which orders for lump sum settlement are entered.

**RULE 21. SETTLEMENT CONTRACTS.** Settlement contracts (Form 69) which originate in Chicago, in compromise of some disputed question of law or fact shall be placed on the settlement contract call and set for hearing and at the time set, presented in triplicate to the commissioner assigned. Settlement contracts which originate outside of Chicago shall be presented in triplicate by mail and shall be investigated or set for hearing the same as petitions for review (see rule 10) in the discretion of the commission. Settlement contracts providing for the payment of compensation in lump sum shall not be acted upon, the payments must be in installments. After the approval thereof, petition for lump sum settlement (Form 28) may be filed and acted upon under rule 19. The commission shall of its own motion fix attorneys' fees in all settlement contracts.

**RULE 22. SUBPOENAS — ISSUANCE — SERVICE.** Blank signed and sealed subpoenas shall be issued upon request.

**RULE 23. DEPOSITIONS.** When it shall be sought to take the deposition of a witness who cannot be present at

the hearing an application for the issuance of a *dedimus potestatem* or commission to take the depositions shall be made to the secretary of the industrial commission, as provided in Chapter 51 of Hurd's Illinois Revised Statutes, being an Act in regard to evidence and depositions in civil cases. Depositions taken by agreement of the parties may be read in evidence.

**RULE 24. REPORTING ACCIDENTS.** All accidents causing the loss of more than one week's time must be reported between the 15th and 25th of the month (Form 45), except fatal accidents, which must be reported immediately.

**RULE 25. FILING INTERIM RECEIPTS AND FINAL SETTLEMENT RECEIPTS.** Receipts showing the payment of compensation, signed by the injured employee, or personal representative, must be filed each month (Form 43). The final settlement receipt (Form 85), signed by the injured employee, or personal representative, must be filed when the final payment of compensation is made.

**RULE 26. AFFIDAVIT SECURITIES—SELF-INSURERS.** Every employer desiring to carry his own risk without insurance must file an affidavit (Form 87) and deposit securities if ordered to do so by the commission.

**RULE 27. CERTIFICATE OF INSURANCE.** Every insurer, upon issuance of a policy, must immediately file a certificate of insurance (Form 49) showing the location and character of the business operations covered, the date effective, the policy number, exclusions, and such other information as may be required.

**RULE 28. TERMINATION OF INSURANCE.** No insurance policy shall be terminated, either by cancellation or expiration, without ten (10) days' notice being given to the commission, and the liability of the insurer thereunder shall not cease until the expiration of such ten (10) days.

**RULE 29. EXCLUSIONS, INSURANCE.** No insurer shall issue a policy excluding any employee, class of employees,



or any operation of the employer, without first receiving the approval of the commission.

**RULE 30. COAL MINING COMPANIES' FUND.** All coal mining companies carrying their own compensation insurance under the Workmen's Compensation Act shall set aside monthly an amount of money based on tonnage or pay roll as shall from time to time be determined by the commission, to be known as the "Workmen's Compensation Fund." A report shall be made monthly (Form 85) to the commission, showing the total output, the amount set aside, the total mine pay roll, the disbursements on account of compensation, the amount expended for medical, surgical and hospital services and the balance on hand. The total amount of the disbursements for any one month shall not exceed the amount deposited to the credit of the fund for the preceding month without specific authority of the industrial commission.

**RULE 31. DEPOSITING COAL MINING FUND.** All Workmen's Compensation Funds must be preserved in one of the following manners: First, the Workmen's Compensation Fund must be kept in a separate account from the other funds of the company and all withdrawals shall be subject to the signature of the industrial commission by its security supervisor or, second, Liberty Bonds or other securities in an amount equal to the amount in the Workmen's Compensation Fund must be deposited with the industrial commission; or, third, Liberty Bonds or other securities in an amount equal to the amount in the Workmen's Compensation Fund must be deposited with a bank organized and existing by virtue of the laws of the State of Illinois, to be held in escrow with the further agreement that said securities shall not be disposed of or withdrawn without the written consent of the industrial commission by its secretary superintendent.

**RULE 32. PROSECUTION, FAILURE TO SECURE COMPENSATION.** The industrial commission shall certify on the first day of each month to the Attorney General a list of

all employers who have failed to comply with the provisions of section 26.

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Bergstrom, Pl. in Error v. Ind. Com. et al., 286 Ill. 29 (Af.). Court will not weigh the evidence.

Big Muddy Coal Co., Pl. in Error v. Ind. Com. et al., 279 Ill. 235 (Af.).

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et al., 289 Ill. 515 (Af.). Paragraph (h) sec. 19 not a limitation provision.

Brine, Def. in Error v. Belden Mfg. Co., 287 Ill. 11 (Af.). Civil action for personal injuries under section 3. Judgment, \$3,200.

Bishop, Adm., Pl. in Error v. Chicago Railway Co., 290 Ill. 194 (Af.). Civil action defectively stated in the declaration. Motion in arrest should have been sustained.

Bristol & Gale Co., Pl. in Error v. Ind. Com., 292 Ill. 16 (R. R.) and 292 Ill. 76. The difference between an employee and an independent contractor stated.

Bowman Dairy Co., Pl. in Err. v. Ind. Com. et al. (Margaret Pelkmann, Admx., Def. in Err.), 292 Ill. 284 (R.). Carl W. Pelkmann was a milk wagon driver employed by the plaintiff in error; his milk wagon was struck by an automobile and he was killed. The plaintiff in error had not elected to come under the Workmen's Compensation Act. It was held that the department of the plaintiff's business where the deceased was employed to render service was not extra-hazardous, within the meaning of section 3.

Butler Street Foundry Co., Pl. in Err. v. Ind. Com., 277 Ill. 70 (R. R.). Section 31 is mandatory on employer to require sub-contractor to insure his liability to pay compensation.

Clark Co., Pl. in Err. v. Ind. Com. et al. (Millie Moore et al., Def. in Err.), 291 Ill. 561 (R. R.). Reversed because there was no evidence in the record on which to base a "lump sum" payment and sent to the commission for further consideration.

Challenge Co., Pl. in Err. v. Ind. Com., 292 Ill. 596 (Af.).

Central Ill. Public Service Co., Def. in Err. v. Ind. Com. et al. (Kilgore, Pl. in Err.), 291 Ill. 256 (R. R.). Rule stated for determining whether an injury arose "out

of the employment." Rule stated in McNicol case, 215 Mass. 497 adopted.

Crescent Coal Co., Pl. in Error v. Ind. Com. et al., 286 Ill. 102 (Af.).

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Chicago, Rock Island & Pacific Co., Pl. in Err. v. Ind. Com. et al., see 291 Ill. 256; 288 Ill. 126 (Af.).

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Central Garage of LaSalle, Pl. in Error v. Ind. Com., 286 Ill. 291 (R. R.). Follows Dietzen Case, 279 Ill. 11.

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Chicago Rawhide Mfg. Co., Pl. in Error v. Ind. Com. et al., 291 Ill. 616 (Af.).

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Compton, Jr. Adm., Pl. in Error v. Ind. Com. et al., 288 Ill. 41 (Af.). School Board is not engaged in a hazardous occupation.

Diamond Livery, Pl. in Error v. Ind. Com. et al., 289 Ill. 591 (R.).

Dickinson et al., Pl. in Err. v. Ind. Com., 280 Ill. 342 (Af.).

Dietrich, Pl. in Error v. Ind. Com. et al., 286 Ill. 50 (Af.).

The Child Labor Law, Woman's Ten Hour Law, the Health and Comfort Act and an ordinance of the city of Peoria are not the statutory and municipal regulations referred to in clause 8, sec. 3.

Ellsworth et al., Def. in Error v. Ind. Com., 290 Ill. 514 (R. R.). After a lump sum settlement has been made the Industrial Board can review its decision under par. (h), sec. 19.

Emery Motor Livery Co., Pl. in Error v. Ind. Com., 291 Ill. 532 (R.). Follows the Hahnemann case, 282 Ill. 316.

Endel Weiss Gardens, Pl. in Error v. Ind. Com., 290 Ill. 459 (R. R.).

Fruit, Def. in Error v. Ind. Com. et al., 284 Ill. 154 (Af.). Follows 275 Ill. 477.

Grand Trunk Western Railway Co., Pl. in Error v. Ind. Com. et al. (Hample et al., Def. in Error), 291 Ill. 167. Judg't modified.

Section 3 is a reasonable exercise of the police power of the state and is not within any constitutional limitation.

Gones, Appellant v. Fisher 286 Ill. 606 (R. R.). Under sec. 29, when an employee is injured by a third person who is not under the act he "is not put to his election between compensation under the compensation act and damages at common law. The common law action and the claim for statutory damages may be prosecuted at the same time."

Halsted Co., Pl. in Error v. Ind. Com. et al., 287 Ill. 509 (Af.).

Hammond Co., Pl. in Error v. Ind. Com. et al., 288 Ill. 262 (Af.). Paragraph (f) sec. 7 does not apply when employer denies liability.



Heed Rec., Pl. in Error v. Ind. Com. et al., 287 Ill. 505 (Af.).

Heinze et al., Pl. in Error v. Ind. Com. et al., 288 Ill. 342 (Af.). Follows 274 Ill. 630.

Hydrex Chemical Co., Pl. in Error v. Ind. Com. et al., 291 Ill. 579 (Af.).

Illinois Central Railroad Co., Pl. in Error v. Ind. Com. et al., 284 Ill. 267 (Af.). The defense was that Webster was engaged in Inter-State commerce. Though the railroad was engaged in Inter-State commerce, "Webster was not handling or engaged in any way in the movement of cars shown to have been employed at the time in Inter-State commerce and there was no showing that the nature of the work he was doing at the time of the injury was any part of Inter-State commerce." Following 273 Ill. 528.

Illinois Indemnity Exchange, Pl. in Error v. Ind. Com., 289 Ill. 233 (Af.). Sec. 23 and 28 construed when the rights of an insurance company are involved.

Illinois Steel Co., Pl. in Error v. Ind. Com. et al., 290 Ill. 594 (R. R.).

International Harvester Co. of New Jersey, Pl. in Error v. Ind. Com. et al., 282 Ill. 489 (R.).

International Coal and Mining Co., Pl. in Err. v. Ind. Com. et al. (James Nicholas, Def. in Error), 293 Ill. 524 (R. R.). Bill in equity. After the board has taken jurisdiction, a lump sum settlement can not be made without its approval. The per cent of loss of use of an injured member will not be supported by the opinion of the employee or an expert witness, as this is an ultimate fact for the board or the court.

Jakub, Pl. in Error v. Ind. Com. et al., 288 Ill. 87 (Af.). When the decision of the arbitrator becomes the decision of the commission, the circuit court may review the decision.

Joliet, City of, Pl. in Error v. Ind. Com. et al., 291 Ill.

555 (Af.). Bill in chancery to review a finding that an employee of the city died of a heat stroke.

Johnson, Pl. in Err. v. Choate, 284 Ill. 214 (Af.).

Section 29 does not violate sec. 14, Federal Con. Follows Deibeikis case, 261 Ill. 454.

Keystone Steel & Wire Co., Pl. in Error v. Ind. Com., 289 Ill. 587 (R. R.).

Keller Rec., Pl. in Error v. Ind. Com. et al., 291 Ill. 314 (R. R.).

Kenna, Def. in Err. v. C. H. & S. R. Co., 284 Ill. 301 (Af.). Action on the case. Judgment \$10,000.

Labanoski, Appellee v. Hoyt Metal Co., 292 Ill. 218 (Af.). Occupational Disease Act and Workmen's Compensation Act not conflicting.

LaMay, Pl. in Error v. Ind. Com. et al., 292 Ill. 76 (R.). Employee and independent contractor distinguished.

Lefens et al., Pl. in Error v. Ind. Com. et al., 286 Ill. 32 (Af.).

Liberty Foundries Co., Pl. in Error v. Ind. Com. et al., 289 Ill. 601 (Af.).

Marshall, Admx., Def. in Error v. Pekin, City of, 276 Ill. 187 (R.).

Mark Mfg. Co., Pl. in Error v. Ind. Com. et al., 286 Ill. 620 (Af.). The only question was whether there was sufficient evidence to justify the finding.

Mattoon Water Co., Def. in Error v. Ind. Com. et al., 291 Ill. 487 (Af.).

Marion County Coal Co., Pl. in Err. v. Ind. Com. (Lorenzo Benvenuto, Admr., Def. in Err.), 292 Ill. 463 (R.).

An employee of a coal mining company, who was the aggressor, was killed by a fellow servant in a quarrel that grew out of a "past event," that had no reasonable connection with any duties they owed the common master. 277 Ill. 96; 285 Id. 31; 287 Id. 564 and 288 Id. 126 differentiated. See observations of the court in reference to

determining whether an accident occurred "in the course of and out of the employment," 290 Ill. 503.

McGarry et al., Pl. in Error v. Ind. Com. et al., 290 Ill. 577 (R. R.). Error for the circuit court to award execution.

Meyer et al., Pl. in Err. v. Ind. Com. et al., 286 Ill. 642 (Af.).

Mephram & Co., Def. in Err. v. Ind. Com. et al., 289 Ill. 484 (Af.). Controlled by Dietzen Co. Case, 279 Ill. 11.

Miss. Power Co., Def. in Err. v. Ind. Com. et al. (Cora L. Hayward, Pl. in Err.), 289 Ill. 353 (R. R.). Workmen's Compensation Act a statutory proceeding. Follows Smith-Lohr Coal Co. case, 286 Ill. 34.

Mich. Cent. Railroad Co., Pl. in Err. v. Ind. Com. et al. (Mabel K. Bond, Admx., Def. in Err.), 290 Ill. 503 (R. R.).

Moll, Pl. in Err. v. Ind. Com. et al., 288 Ill. 347 (Af.). Workmen's Compensation Act does not apply to minors that are illegally employed.

McMorran & Co., P. in Err. v. Ind. Com. et al. (Alfred A. Habel, Def. in Err.), 290 Ill. 569 (R. R.).

The loss of any portion of the first phalange of the finger will not be considered under paragraph (e) of section 8 the loss of the first phalange of the finger.

Morris & Co., Pl. in Err. v. Ind. Com. et al., 284 Ill. 67 (Af.). See 288 Ill. 422.

McMurray, Admx., Def. in Err. v. Peabody Coal Co., 281 Ill. 218 (R. R.).

Murrell, Def. in Error v. Ind. Com. et al. (Gordon A. Ramsay, Admr., Pl. in Err.), 291 Ill. 334 (Af.). Illegitimate children are not included within the provisions of the Workmen's Compensation Act.

National Zinc Co., Def. in Err. v. Ind. Com. et al. (Frank L. Trutter, Admr., Pl. in Err.), 292 Ill. 598 (R. R.). Burden is upon the administrator to prove the

existence of a beneficiary. See observations of the court upon the presumptions of death after seven years.

Nelson Railroad Con. Co., Def. in Err. v. Ind. Com. et al. (Laura B. McGhan, Admx., Pl. in Err.), 286 Ill. 632 (Af.). Follows Dietzen Co. case, 279 Ill. 11.

Northern Ill. Traction Co., Pl. in Error v. Ind. Com. et al., 279 Ill. 565 (R. R.). No evidence in the record that the accident arose out of and in the course of the employment.

O'Callaghan et al., Pl. in Error v. Ind. Com. et al., 290 Ill. 222 (Af.).

Otis Elevator Co., Pl. in Error v. Ind. Com. et al., 288 Ill. 396 (R. R.). Court erred in "entering a money judgment and in ordering execution."

Oriental Laundry Co., Pl. in Err. v. Ind. Com. et al. (Jeanette E. Curtis, Def. in Err.), 293 Ill. 539 (R.). The decision of the commission was dated June 20, 1918, a præcipe and bond were filed in the circuit court within the time required by statute by plaintiff in error. May 13, 1919, the attorney of plaintiff in error filed an affidavit averring among other matters that the writ of *certiorari* had been lost. Held that it was proper for the court to enter an order that alias writs of *certiorari* and *scire facias* issue.

Paul, Pl. in Error v. Ind. Com. et al., 288 Ill. 532 (R. R.). Duty of the commission to determine persons entitled to compensation. Follows Smith-Lohr Coal Co. case, 286 Ill. 34.

Peabody Coal Co., Def. in Error v. Ind. Com. et al., 287 Ill. 407 (Dis.).

Peabody Coal Co., Def. in Error v. Ind. Com. et al., 289 Ill. 330 (R. R.).

Peabody Coal Co., Pl. in Error v. Ind. Com. et al., 289 Ill. 449 (Af.). Where the evidence is undisputed, the court may enter a judgment different from that fixed by the commission. Expert testimony competent.

Pekin Cooperage Co., Pl. in Err. v. Ind. Com. et al.

(Henry Rasor, Def. in Err.), 285 Ill. 31 (Af.). Rasor was injured in a fight with one of his co-laborers which arose out of a disagreement about the work they were doing for a common master. Held that the injury arose in the course of the employment. See same holding in, 287 Ill. 564. See somewhat similar state of facts but sufficiently different to warrant a contra holding, 292 Ill. 406, 290 Ill. 459.

Peoria Railway Terminal Co., Pl. in Err. v. Ind. Com. et al., 279 Ill. 352 (Af.).

Peoria Railway Co., Pl. in Err. v. Ind. Com. et al. (William W. Wade, Def. in Err.), 290 Ill. 177 (R. R.). A lump sum settlement does not preclude a review under paragraph (h), sec. 19.

Peoria Cordage Co., Pl. in Err. v. Ind. Board of Illinois et al. (Julia Favre, Exrx., Def. in Err.), 284 Ill. 90 (R. R.). Verdict of a coroner's jury not admissible to fix a civil liability, "except in so far as a legitimate finding of physical facts within the power and jurisdiction of the coroner may have that effect." See holding changed, 288 Ill. 422.

Peterson & Co., Pl. in Err. v. Ind. Board of Ill. et al., 281 Ill. 326 (R. R.).

Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Co., Pl. in Err. v. Ind. Com. et al., 291 Ill. 396 (R.).

Rock Island, City of, Pl. in Err. v. Ind. Com. et al. (Hugh McGee, Def. in Err.), 287 Ill. 76 (Af.).

Defendant in error was a street sweeper in the City of Rock Island. Held under division 1, paragraph (b), section 3 extra-hazardous occupation.

Rock Island Bridge and Iron Works, Pl. in Err. v. Ind. Com. et al. (James McQuaid, Admr., Def. in Err.), 287 Ill. 648 (R. R.).

Rosenthal Co., Pl. in Err. v. Ind. Com. et al., 290 Ill. 323 (R. R.). Follows Otis Elevator Co. case, 288 Ill. 396.

Staley, Admx., Pl. in Err. v. Ill. Cent. R. Co., 268 Ill. 356 (R. R.). Facts considered that determine whether

the employee should prosecute under Federal Employers' Liability Act or the Workmen's Compensation Act, and federal authorities reviewed. Following this are: 273 Ill. 528; 276 Id. 563; 280 Id. 342; 284 Id. 301; 286 Id. 441; 288 Id. 603; 291 Id. 396, and 290 Id. 599.

Stephens Eng. Co., Pl. in Error v. Ind. Com. et al., 290 Ill. 88 (Af.).

Schweiss Admx., Pl. in Err. v. Ind. Com. et al. (Wabash Railway Co., Def. in Error), 292 Ill. 90 (R. R.).

See cases reviewed that consider the question of the employee's right to recover for injuries suffered in going to and from the place of his employment.

Seggebruch, Pl. in Err. v. Ind. Com. et al. (Henry J. Luecke, Def. in Err., 288 Ill. 163 (R. R.). Follows Vaughan's Seed Store case, 275 Ill. 477.

Spring Valley Coal Co., Pl. in Err. v. Ind. Com. et al. (Peter Sabatini, Def. in Err.), 289 Ill. 315. Reversed for a correction of the award.

Spiegel's House Furnishing Co., Pl. in Err. v. Ind. Com. et al. (Katherine J. Cloyes, Admx., Def. in Err.), 288 Ill. 422 (R. R.). Error to admit verdict of coroner's jury, as evidence. Former holdings reviewed.

Swift & Co. Pl. in Error v. Ind. Com. et al. (Frank Blum, Def. in Err.), 287 Ill. 564 (Af.).

Swift & Co., Pl. in Error v. Ind. Com. et al. (Beatrice Kucinski, Admx., Def. in Err.), 288 Ill. 132 (Af.).

Springfield Coal Mining Co., Pl. in Err. v. Ind. Com. et al. (Mary Wiley, Admx., Def. in Err.), 291 Ill. 408 (Af.). "Salary," "wages" and "earnings." Terms used in section 10 defined.

Smith-Lohr Coal Mining Co., Pl. in Err. v. Ind. Com. et al. (Mayme Jones, Admx. et al., Def. in Err.), 286 Ill. 34 (Af.). Follows Goelitz Co. case, 278 Ill. 174. Payment under paragraph (f), section 7 by the employer to the personal representative applies only when there is no hearing or determination before the arbitrator.

Smith-Lohr Coal Mining Co., Pl. in Err. v. Ind. Com.

et al. (Joseph Millautsch, Def. in Err.), 291 Ill. 355 (R. R.). Held "Compensation cannot be awarded for both loss of earning capacity on account of the injury and disfigurement resulting from the same injury." Paragraph (c), section 8.

Storrs, Pl. in Err. v. Ind. Com. et al. (Dier, Def, in Err.), 285 Ill. 595 (Af.). "Every employer enumerated in paragraph (b) of section 3 is conclusively presumed to be subject to the act unless he elects to the contrary. Plaintiff in error made no election." His business was managing and keeping in repair twelve or fifteen buildings of his own. He had employed a foreman for twelve years, to whom he paid wages. Jacob Dier was injured while working under the foreman. Held that the owner of the buildings was "maintaining, repairing," within the meaning of section 3 (b).

Sunnyside Coal Co., Pl. in Err. v. Ind. Com. et al. (J. E. O'Neal, Admr., Def. in Err.), 291 Ill. 523 (Af.).

Stubbs, Pl. in Err. v. Ind. Com. et al. (John Joohs, Def. in Err.), 289 Ill. 525 (Af.).

Tazewell Coal Co., Pl. in Err. v. Ind. Com. et al. (Martina Lipnick, Admx., Def. in Err.), 287 Ill. 465 (R. R.). The record did not show just what notice was given to plaintiff in error on a petition filed under section 9 asking that compensation be paid in a lump sum. Held fatal to the jurisdiction.

Thede Bros. et al., Pl. in Err. v. Ind. Com. et al. (Joseph Marsh, Def. in Err.), 285 Ill. 483 (R. R.). Evidence reviewed relating to the jurisdiction of the commission.

Tribune Co., Pl. in Err. v. Ind. Com. et al. (Charles Kidd, Def. in Err.), 290 Ill. 402 (R. R.). After the statutory time for giving notice had elapsed, a lump sum settlement was submitted to the commission and confirmed. Held that it was within the power of the commission to review the settlement under paragraph (h), section 19.

Union Bridge Co., Pl. in Error v. Ind. Com. et al.,

287 Ill. 396 (R. R.). The act does not apply to injuries that occur outside the state.

United States Disposal & Recovery Co., Pl. in Error v. Ind. Com. et al., 291 Ill. 480 (R.). Follows Dietzen Co. case, 279 Ill. 11.

Vose et al., Def. in Err. v. Central Ill. Public Service Co., 286 Ill. 519 (Af.). Recovery had against a third party under sec. 29. Plaintiff in error engaged in a hazardous occupation.

Wabash Railway Co., Pl. in Err. v. Ind. Com. et al. (Claude Williams, Def. in Err.), 286 Ill. 194 (Af.). Notice to foreman of the injury sufficient to give jurisdiction. Follows Parker-Washington Co. case, 274 Ill. 498. Previous to his employment defendant in error had lost an arm. In the course of his employment he lost a leg. Circuit court allowed compensation for a permanent disability under paragraph (e) section 8. New question. Reasoning of the Massachusetts court followed, 223 Mass. 273.

Walton, Admx., Def. in Err. v. Pryor et al., 276 Ill. 563 (R.). Action on the case. Brakeman killed in Missouri. Judgment, \$17,000. Section 6 of the Federal Employers' Liability Act and section 2 of "An act requiring compensation for causing death by wrongful act, etc." (Ses. Laws 1903, p. 217), which says "that no action shall be brought or prosecuted in this State to recover damages for death occurring outside of this State, etc." compared.

Walsh Teaming Co., Pl. in Err. v. Ind. Com. et al. (Tuline Peterson, Admx., Def. in Err.), 290 Ill. 536 (Af.). An award that is supported by any competent evidence will be affirmed. Following Lefens case, 286 Ill. 32.

Wangler Boiler Co., Pl. in Err. v. Ind. Com. et al. (Herrick, Admr., Def. in Err.), 287 Ill. 118 (Af.). An extinguishment of compensation does not follow, when the widow of a deceased employee re-marries. See economic theory of the act stated.

Wangerow, Pl. in Err. v. Ind. Board et al. (The Chi-



cago Junction Railway Co., Def. in Err.), 286 Ill. 441 (Af.). See Staley case, 268 Ill. 356.

Western Electric Co., Pl. in Err. v. Ind. Com. et al. (Carrie Burns Lewis, Admx., Def. in Err. L), 285 Ill. 279 (Af.).

Competent evidence in the record to sustaining finding. Munn case, 274 Ill. 70, differentiated.

Wells Bros. Co., Pl. in Err. v. Ind. Com. et al. (Luke Hallerin, Def. in Err.), 285 Ill. 647 (Af.). Compensation for permanent disfigurement under paragraph (c), section 8 and permanent partial incapacity resulting from the injury allowed under the amendment of 1915, p. 403.

Willett Co., Pl. in Err. v. Ind. Com. et al. (Anna Ulbricht, Admx., Def. in Err.), 287 Ill. 487 (R. R.). Held on a review of the facts in the record that the plaintiff in error had complied with the conditions of the statute in giving notice of its election not to be bound by the act. "Unless a particular form of notice is prescribed by the statute or by the rules of the board, actual written notice is all that is required."

Wisconsin Steel Co., Pl. in Err. v. Ind. Com. et al. (Karczewski, Admx., Def. in Err.), 288 Ill. 206 (R. R.). Evidence reviewed and found not sufficient to support an award.



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